

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 93

**WM. A. MARSHALL, DEPUTY COMMISSIONER,
14TH COMPENSATION DISTRICT, U. S. EM-
PLOYEES COMPENSATION COMMISSION, ET
AL., PETITIONERS,**

vs.

G. PLETZ.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 18, 1942.

CERTIORARI GRANTED OCTOBER-12, 1942.

NO. 9896

United States
Circuit Court of Appeals

For the Ninth Circuit.

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission, **FIREMAN'S FUND**
INSURANCE COMPANY, a corporation,
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation, and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Appellants,

vs.

G. PLETZ,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United
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[Clark's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:**

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H. B. BECKETT,
Board of Trade Building,
Portland, Oregon, and

**HARRY L. RAFFETY and
DAVID C. PICKETT,**
Mead Building,
Portland, Oregon,
for Appellants.

**WM. P. LORD and
T. WALTER GILLARD,**
Guardian Building,
Portland, Oregon,
for Appellee.

Wm. A. Marshall

In the District Court of the United States for the
District of Oregon

July Term, 1937

Be It Remembered, That on the 13th day of
August, 1937, there was duly filed in the District
Court of the United States for the District of Ore-
gon, a Complaint in words and figures as follows,
to wit: [1*]

In the District Court of the United States
For the District of Oregon

E. 9707

G. PLETZ,

Plaintiff,

vs.

WM. A. MARSHALL, Deputy Commissioner 14th
Compensation District, U. S. Employees Com-
pensation Commission; FIREMAN'S FUND
INSURANCE COMPANY, a corporation, and
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation; and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Defendants.

COMPLAINT.

For cause of action against defendants, plaintiff
alleges:

*Page numbering appearing at foot of page of original certified
Transcript of Record.

I.

That during all the times herein mentioned, the defendant Wm. A. Marshall was the duly appointed, qualified and acting deputy commissioner for the 14th Compensation District, United States Employees Compensation Commission, administering the Longshoremen's and Harbor Workers' Compensation Act.

II.

That during all the times herein mentioned, the defendant Fireman's Fund Insurance Company was a corporation, organized under the laws of the State of California, and engaged in writing policies of compensation insurance agreeing to pay the benefits to injured longshoremen.

III.

That on the 12th day of November, 1935, plaintiff was in the employ of the McCormick Steamship Company and/or the Chas. R. McCormick Lumber Company, and the owners and/or operators of the West Planter, a merchant vessel which was then lying in the navigable waters of the Willamette River, and a cargo of freight was being loaded into the cargo spaces of said steamship by means of the steamships loading machinery, gear and equipment and the services [2] of longshoremen.

IV.

That on the 12th day of November, 1935, plaintiff was engaged in loading cargo on said vessel and

was in one of the cargo holds of said vessel when plaintiff was struck on the left side, hips and leg and as a result thereof forthwith sustained certain personal injuries which ever since said day have prevented plaintiff from following his said vocation, or any vocation, and plaintiff has sustained as a result of said accident, a continuing disability ever since said date, and will continue to sustain a disabling disability in the future.

V.

That immediately following said injury plaintiff was placed in a hospital for hospitalization by the agents of the defendant Fireman's Fund Insurance Company, and the expenses of said hospitalization were paid by said defendant; that immediately after plaintiff was placed in said hospital and for more than one year after the 12th day of November, 1935, doctors employed by said defendant rendered plaintiff medical treatments, endeavoring to cure plaintiff of his said disabilities, and said defendant required plaintiff to submit to a surgical operation about February 8, 1936, in an endeavor to cure plaintiff, and all of said services were paid for by said defendant.

VI.

That on the 15th day of November, 1935, Wendell Grey, an attorney at law, representing the said defendant company, called upon plaintiff at the hospital and secured a written statement from plaintiff as to the circumstances of said accident; that there-

after and on the 15th day of November, 1935, defendant's said attorney tendered plaintiff a sight draft on the defendant Fireman's Fund Insurance Company, in the sum of \$14.23 per week, which the said attorney computed was the rate of compensation that plaintiff would [3] receive, based on his earnings as a longshoreman for one year immediately prior to the day of accident; that plaintiff at said time remonstrated with defendant's said attorney and stated that plaintiff's earnings had been greater than ascertained by said attorney, and the rate of compensation payable should be in a larger sum, whereupon defendant's said attorney agreed to investigate further in regard to plaintiff's said earnings; that immediately after said accident plaintiff's employer notified the defendant of the said accident sustained by plaintiff, and the liability of said defendant to pay plaintiff compensation therefor; that the said investigations and the tender of compensation was pursuant to the aforesaid orders and directions of said defendant.

VII.

That on or about the 15th day of November, 1935, the Chas. R. McCormick Lumber Company, a corporation, and the McCormick Steamship Company, a corporation, the owners of said SS West Planter, filed with the United States Employees' Compensation Commission, at Seattle, a report of said accident, wherein said employer acting through Messrs. Rafferty & Pickett, attorneys at law, did state the

name of the employer, the nature of the business and the name of the insurance carrier, and the fact that said insurance carrier was notified of said accident on the 14th day of November, 1935, giving the name of the plaintiff, check number, age, occupation, earnings, the name of the vessel, date of accident, together with information that one Chas. Rudberg, the superintendent for the employer, had knowledge of the injury to plaintiff, and the circumstances of the accident and stating generally the nature of the injuries sustained by plaintiff and that said employer had authorized medical and hospital services, and naming the doctor and hospital; that on said day a letter was written to said deputy commissioner, wherein the following appears: [4]

“Enclosed herewith you will find the Following:

1. Form 202, first notice of accident.

The foregoing notice pertains to a claim of G. Pletz against the SS West Planter and/or McCormick Steamship Co. This claim arises out of an accident that occurred November 12th at Portland, Oregon, on board the SS West Planter.

Yours very truly,

(sgd) DAVID C. PICKETT”

That thereafter and on the 19th day of November, 1935, Leland V. Belknap, a duly licensed physician filed a report with said deputy commissioner, wherein the said Leland V. Belknap gave certain

personal history of the plaintiff and described the accident and his opinion as to the duration of the disability and the extent thereof; that on the 26th day of November, 1935, the following was filed with the said deputy commissioner:

**"United States Employees' Compensation
Commission
Office of**

**Deputy Commissioner Wm. A. Marshall
Administering Longshoremen's and Harbor
Workers' Compensation Act.**

**NOTICE TO THE DEPUTY COMMIS-
SIONER THAT THE PAYMENT OF
COMPENSATION HAS BEGUN WITH-
OUT AWAITING AWARD**

(To be submitted in duplicate to Deputy Com-
missioner who will forward copy to Com-
mission)

1. Name of employer—SS West Planter,
Charles R. McCormick Lumber Co. of Dela-
ware &/or McCormick Steamship Co.
2. Office Address: Street and No.—Foot of
N. W. Irving. City or Town—Portland, Ore.
3. Name of injured person—G. Pletz.
4. Present address: Street and No.—1505
S. W. Mill St. City or Town—Portland, Ore.
5. Date of accident or first illness—Nov. 12,
1935. Disability began Nov. 13, 1935.
6. Compensation is to be paid to G. Pletz.
7. Average daily wage \$..... multiplied by

Wm. A. Marshall

..... \$1109.82 divided by 52—average weekly wage 21.34 multiplied by 2/3—compensation rate, \$14.23.

8. Compensation shall be payable from the 20 day of November 1935, until notice is given the Deputy Commissioner that payment has been stopped or suspended.

9. Date of first payment—Nov. 26, 1935.

Name of Insurance Carrier—Fireman's Fund Insurance Company.

Signed by **RAFFETY & PICKETT**

Official Title—Claim Attorneys

Dated Nov. 26, 1935."

That thereafter there was filed with the said Deputy Commissioner, the following: [5]

"Raffety & Pickett
410 Mead Building
Portland, Oregon

November 26, 1935

Oregon 28507

G. Pletz vs SS Planter 11-12-35

Mr. Wm. A. Marshall

Deputy Commissioner

620 Fed. Office Bldg.

Seattle, Washington

Dear Sir:

Enclosed here with you will find the following:

1. Form 206, notice that payment of compensation has begun.

The foregoing notice pertains to the claim of G. Pletz against the SS West Planter and/or McCormick Steamship Co. This man's disability began November 13th and eliminating the waiting period, compensation is payable from November 20th.

We ascertained from the Longshoremen's Hall that this workman's earnings averaged \$21.34 per week. This entitles him to compensation at \$14.23 per week. We are paying him at this rate.

Yours very truly,
(sgd) DAVID C. PICKETT"

That on the 11th day of January, 1936, the attorneys for said defendant mailed to the deputy commissioner the following:

"Raffety & Pickett
410 Mead Building
Portland, Oregon

January 11, 1936

Oregon 28507

G. Pletz vs SS West Planter 11-12-35

Mr. Wm. A. Marshall
Deputy Commissioner
620 Fed. Office Bldg.
Seattle, Washington

Dear Sir:

Your case No. 431-6

I have your letter dated January 10, 1936, inquiring regarding payment of compensation

Wm. A. Marshall

to Mr. Pletz. On December 4, 1935, I addressed a communication to you stating that Mr. Pletz had refused to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Up to the present time Mr. Pletz has not accepted compensation.

Yours very truly,

(sgd) DAVID C. PICKETT

DCP:FW"

1 [6]

"November 5, 1936 431-6

Messrs. Raffety & Pickett
410 Mead Building
Portland, Oregon

Ore. 28507

Gentlemen:

Re: G. Pletz, injured 11-12-35
McCormick SS "West Planter"

This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise as to present status of the matter.

Yours truly,

Examiner-Investigator

CFO/IK"

That on March 8, 1937, the said attorneys wrote the U. S. Deputy Commissioner as follows:

"Raffety & Pickett
410 Mead Building
Portland, Oregon

March 8, 1937

Oregon 28507

Gus Pletz vs SS West Planter 11-12-35

Mr. Wm. A. Marshall

Deputy Commissioner

620 Fed. Office Bldg.

Seattle, Washington

Dear Sir:

Your case No. 431-6

I have your inquiry of March 2, 1937, inquiring as to the status of this claim subsequent to our letter of November 6, 1936. I beg to state that this man still claims to be suffering from disability resulting from the accident. None of the doctors to whom I have sent him can verify his claims of disability. From my conversation with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and to secure from me an agreement for perpetual medical care.

Yours very truly,

(sgd) DAVID C. PICKETT

DCP:RA"

VIII.

That up to the 23rd day of July, 1937, and thereafter, the defendant has continued to render plaintiff medical aid and assistance; that on repeated occasions ever since said 12th day of November, 1935, plaintiff has called personally at the office of [7] Messrs. Raffety & Pickett and discussed with David C. Pickett, Esq., of said firm, the nature of plaintiff's disability and compensation that should be due plaintiff therefor, under the terms of said Longshoremen's Act; that plaintiff repeatedly advised the attorney for the said defendant that compensation offered plaintiff was an amount less than fixed by said Act; that plaintiff thereupon claimed the defendant should pay plaintiff a lump sum settlement and the said defendant, acting through said attorneys, did discuss the question of lump sum settlement with plaintiff and advised plaintiff medical ratings of disability were necessary and consent of the Deputy Commissioner and the U. S. Employee's Compensation Commission was necessary;

That at a hearing held before the Deputy Commissioner in relation to said claim, the following testimony was given by claimant:

"Q. And then what happened, Gus, did you keep on getting medical care and keep on talking to Mr. Pickett? A. Yes.

Q. And up until the present time you never have received any compensation at all?

A. No.

Q. And then eventually, then in April you came to me?

A. No, I did go up to Mr. Pickett, because I know that I would have a long time to go until I would be good, so I decided about two months before I sent in this report of the claim, I was asking Mr. Pickett that I had better take the compensation, because it will take a long time until I can work. And Mr. Pickett says, "You wait for a while, you might get a little better when it gets warmer." So I did let it go another couple of months, and then I did come up and insist that I wanted the compensation, and then Mr. Pickett told me I had to file a claim with Mr. Marshall.

Q. Now, when was this, Gus?

A. Well, it was about a day before I seen you.

Q. Did you send a claim in?

A. Yes, Mr. Pickett in the office fixed it up for me.

Q. Wait a second,—this claim that you really sent in was sent in by our office, was it not?

A. No, it was sent in by Mr. Pickett.

Mr. Lord: Is that right, Dave?

Mr. Pickett: It was made out for him by our girl and mailed by him.

Mr. Lord: I thought that was my office, Mr. Marshall, let me see that (indicating). [8]

Mr. Pickett: I think at least I told him that our girl would make it out if he wanted me to.

The Witness: Yes, you said that you would make it out if I wanted you to, and the girl did make it out.

Mr. Pickett: Didn't the girl make it out for you?

A. Yes, the girl made it out for me, you was in there, too.

Mr. Pickett: It is my recollection that that is right. I know I told you we would do it.

The Commissioner: That is a different date, that letter there, I was trying to see whether it had any relation to the claim (submitting a letter to Mr. Lord).

Mr. Lord: Do you mind if I go all through this (referring to the file)?

The Commissioner: Why, no.

Q. Is there anything else, Gus, that you want to explain here to the Commissioner about your claim?

A. Well, I never did know that I did have to file a claim with Mr. Marshall,—I even didn't thought I need a lawyer, and I told Mr. Pickett that I always tried to get along with him without using a lawyer at all.

The Commissioner: Didn't you discuss this matter of compensation with some of the boys during that long period of time? A. Yes.

The Commissioner: What did they tell you?

A. They never did tell me anything.

The Commissioner: They never told you you had to file it with the Deputy Commissioner at all? A. No.

Q. You have known me, Gus, a long, long time?
A. Yes.

The Commissioner: How long did you work as a longshoreman?

A. Since 1930, I worked first on the river boats, and then on the docks."

IX.

That after the filing of the aforesaid claim, the said defendant did file with the said Deputy Commissioner, the following:

"To: Wm. A. Marshall, Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission Established Under the Provisions of the Longshoremen's and Harbor Workers' Compensation Act: G. Pletz: And Wm. P. Lord, His Attorney,

You and each of you will please take notice that the employer and the insurance carrier have controverted, and, at the proposed hearing, will object to consideration, by said Deputy Commissioner, of the above entitled claim of G. Pletz, as claimant, against the SS West Planter, Charles R. McCormick Lumber Company of Delaware and McCormick Steamship Company, as employer, and Fireman's Fund Insurance Company, as insurance carrier, on the grounds and for the reason that said claimant did not file a claim for compensation *with* the time prescribed by subdivision (a), Section 13 of

the Longshoremen's and Harbor Workers' Compensation Act. No compensation was paid in this claim and the claimant failed to file a claim for compensation within one year after the date of the accident for which [9] compensation is claimed, and said employer and said insurance carrier file objection to such failure, and by reason thereof, said claimant's right to compensation for disability under this Act is barred.

Dated at Portland, Oregon, this 6th day of May, 1937.

(sgd) DAVID C. PICKETT

Attorney for Employer
and Insurance Carrier"

X.

That thereafter and on the 23rd day of July, 1937, the said Deputy Commissioner held a hearing, after due notice to the parties; there was present at said hearing the plaintiff and Wm. P. Lord, his attorney, and the defendants were represented by David C. Pickett and Wendell Grey, and thereupon plaintiff offered sworn testimony establishing all of the facts hereinbefore set forth and among other things, at said hearing, it was agreed that all questions relating to the rating of disability and the payment of compensation would be held in abeyance until there was a final judicial determination of the question as to whether or not the Deputy Commissioner had jurisdiction to hear this claim by

reason of plaintiff's failure to file a claim with the Deputy Commissioner within one year from the 12th day of November, 1935.

XI.

That thereafter and on the 29th day of July, 1937, the Deputy Commissioner having under consideration the testimony and proceedings had before him in connection with the aforesaid claim did make an order as follows:

"Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT:

That on the 12th day of November, 1935, the claimant above named was in the employ of the employer above named at Portland, in the State of Oregon, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on April 20, 1937, the claimant herein [10] filed in the office of the Deputy Commissioner a formal claim for compensation on account of the injury sustained by him on November 12, 1935; that within 14 days after

the said injury the insurance carrier for the employer offered to the claimant the compensation then due and payable; that the claimant refused to accept the compensation so offered and no compensation was paid by the employer or insurance carrier to the claimant at any time subsequent thereto; that the said claim filed by the claimant on April 20, 1937, was not filed within one year after the injury.

Upon the foregoing facts it is ordered by the Deputy Commissioner that the claim be and it is hereby Rejected for the following reasons:

Failure to file a claim for compensation within one year after the injury.

Given under my hand at Seattle, Washington this 29th day of July, 1937.

Deputy Commissioner
Fourteenth Compensation District."

XII.

That the McCormick Steamship Company and the Chas. R. McCormick Lumber Company are made party defendants to this suit for the reason that the said McCormick Steamship Company and the Chas. R. McCormick Lumber Company are parties in interest and they have a right if they so desire to plead or inter-plead herein.

XIII.

That by reason of the facts alleged in this complaint, the defendants have waived the filing of any

claim by plaintiff within one year and said defendants should be estopped from asserting that the plaintiff failed to file a claim for compensation with the Deputy Commissioner, on account of said accident, within one year from the 12th day of November, 1935.

Wherefore plaintiff prays a mandatory injunction of this Court directed to the defendant Wm. A. Marshall, requiring the defendant Wm. A. Marshall to set aside the aforesaid order of the 29th day of July, 1937, rejecting plaintiff's claim and to receive testimony as to the extent of the injuries sustained by plaintiff and the duration thereof, and the amount of temporary total disability [11] payable to plaintiff and a rating of any permanent partial disability sustained by plaintiff, and that plaintiff be awarded his costs and disbursements and that the said Deputy Commissioner fix a reasonable attorney fee to be paid plaintiff's attorneys in connection with all proceedings relating to this claim, and for such other, further and different relief as may be meet with the principles of equity.

WM. P. LORD,

T. WALTER GILLARD,

Attorneys for Plaintiff.

[Endorsed]: Filed August 13, 1937. G. H. Marsh,
Clerk. By H. S. Kenyon, Deputy. [12]

And Afterwards, to wit, on Tuesday, the 14th day of February, 1939, the same being the 84th Judicial day of the Regular November, 1938 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[13]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard before the undersigned Judge, the plaintiff appearing in person and by his attorney Wm. P. Lord, and the defendants appearing by H. B. Beckett and David C. Pickett, their attorneys, and the cause was argued upon the pleadings, and the transcript of testimony of witnesses, exhibits and proceedings had before Wm. A. Marshall, Esq., Deputy Commissioner for the 14th Compensation District, and the court being of the opinion that specific findings should be made by the said Deputy Commissioner covering the issues made by the respective parties before the Deputy Commissioner, and being fully advised in the premises.

It Is Ordered that this cause be and the same is hereby referred back to the Deputy Commissioner, Wm. A. Marshall, Esq., and that he make specific findings covering each and every issue made by the respective parties herein;

It Is Further Ordered that the Deputy Commissioner shall fix a time and place to hear respective counsel as to the findings to be made by said Deputy Commissioner, and that respective counsel are entitled to appear before said Deputy Commissioner.

and to present their theories as to the facts to be found by said Deputy Commissioner upon the issues made in this [14] proceeding, and that any party to this proceeding may at the discretion of the deputy commissioner offer further and additional testimony at said hearing in further support of his theory or of any issue in this cause;

It Is Further Ordered that the Deputy Commissioner, upon any hearing of this proceeding, may make such findings and award as he may be advised in the premises, and to the same extent as if the original findings and award in this proceeding had not been made;

It Is Further Ordered that the transcript of testimony and exhibits in this cause, now on file with the clerk of this court, be forthwith transmitted by him to Wm. A. Marshall, Esq., and that said Wm. A. Marshall, Esq., is hereby authorized to use said transcript of testimony in connection with the entry of any findings and award pursuant to this order.

Dated this 14th day of February, 1939.

CLAUDE MCCOLLOCH,

Judge.

[Endorsed]: Filed February 14, 1939. G. H. Marsh, Clerk. By R. DeMott, Deputy. [15]

And Afterwards, to wit, on the 19th day of February, 1940, there was duly Filed in said Court, a Supplemental Complaint, in words and figures as follows, to wit: [16]

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Now comes plaintiff and for supplemental complaint alleges:

I.

That a hearing was had upon the record of testimony and proceedings before the Hon. Claude McColloch, Judge of the above entitled court, and thereupon and on the 21st day of February, 1939, the court made an order wherein the court referred this cause back to the Deputy Commissioner to make specific findings covering each and every issue made by the respective parties in this cause; that the court further ordered that the respective parties could offer additional testimony, and directed that thereafter the Deputy Commissioner should make such findings and award as he may be advised in the premises.

II.

Thereafter and on the 15th day of February, 1940, the Deputy Commissioner made a finding and award rejecting plaintiff's claim for compensation on the grounds (1) that said claim was not filed within one year after the injury, and (2) that the claimant has not been misled or overreached by the employer or insurance carrier, and further ordered

that plaintiff be given and furnished [17] treatment by a psychiatrist for the cure of his disability.

III.

That plaintiff objects to said findings of fact and alleges that the said findings made by the Deputy Commissioner are not supported by any substantial evidence.

IV.

That the Deputy Commissioner found as follows:

(1) The claimant herein, following his injury, contemplated bringing an action against a third party. He consulted an attorney with that purpose in mind. On at least two occasions he was offered installment payments of compensation as is required by the Act and refused to accept same. Later he consulted another attorney at several different times who advised him to accept compensation. The record fails to show that the claimant was misled or overreached by the employer or insurance carrier.

and in this the Deputy Commissioner did not give due credit to the fact that plaintiff, as result of said injury or natural causes, was not in a fit mental condition to follow any given line of conduct, or know or appreciate the significance of his acts, and that in point of fact the plaintiff was mentally and physically incompetent to transact any important business; that this objection is borne out by the finding that plaintiff should be awarded continued

treatment by a psychiatrist, and in particular by the second finding made by said Deputy Commissioner on the said 15th day of February, 1940.

V.

That the Deputy Commissioner made no finding in respect to confidential relationship which arose out of the fact that the insurance carrier was represented by an experienced claims attorney who was continually advising plaintiff in respect to his rights, negotiating with plaintiff as to whether he would accept a lump sum, and arguing with plaintiff as to how much such lump sum should be, when in truth and in fact the said claims attorney had no right to encourage the said claimant to believe that a lump sum could be arranged for, and that he did actually cause plaintiff [18] to believe a lump sum could be arranged, but that the continued medical service requested by plaintiff would not be rendered, and this was a point of dispute between plaintiff and the claims attorney which must be ironed out and agreed upon before a lump sum settlement of the compensation would be made, and by engaging plaintiff in repeated conversations at the claims attorney's office a relationship of trust and confidence developed, and the advice given plaintiff by attorneys was undermined or disregarded by plaintiff due to the continual negotiations, conferences and contacts with doctors representing the insurance carrier, and that the action of the claims attorney in respect to these negotiations, if

not actively, was constructively fraudulent, and was fraudulent in equity and good conscience, and that in order to lull plaintiff into a sense of security, the said insurance carrier did furnish plaintiff medical service for a long time after the expiration of one year from November 12, 1935, and to and including July 23, 1937; that the Deputy Commissioner gave no credence to testimony that was developed at the hearing as impugning the motives of the insurance carrier herein, and that the claims attorney in this proceeding was appearing for three separate insurance coverages, viz., against the ship, against the McCormick Steamship Company, and against the Chas. R. McCormick Lumber Company of Delaware, all of which appears in the record herein.

VI.

That the findings of fact by the Deputy Commissioner should be set aside and the insurance carrier estopped from claiming that this plaintiff's claim was not filed within one year from the 12th day of November, 1935, and plaintiff does hereby appeal from the aforesaid compensation order rejecting plaintiff's claim dated February 15, 1940.

Wherefore plaintiff prays (1) that the findings of fact made by the Deputy Commissioner on the 15th day of February, 1940, [19] be set aside, and that the award made thereon be set aside insofar as the same rejects plaintiff's claim for compensation for personal injuries occurring on November 12, 1935, while employed upon the SS West Planter,

and the Fireman's Fund Insurance Company, and (2) for a decree as prayed for in plaintiff's original complaint on file herein; (3) that the Deputy Commissioner be required to file with the clerk of this court an original transcript of all proceedings had before him.

WM. P. LORD,

T. WALTER GILLARD,

Attorneys for Plaintiff.

[Endorsed]: Filed February 19, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [20]

And Afterwards, to wit, on the 12th day of September, 1940, there was duly Filed in said Court, Motion of Fireman's Fund Insurance Company, et al., to Dismiss Suit, in words and figures as follows, to wit: [21]

[Title of District Court and Cause.]

MOTION TO DISMISS SUIT

Come now the defendants, Fireman's Fund Insurance Company, Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company, and move the Court for an order dismissing the above entitled suit for the reason and upon the grounds that both the original complaint and the supplemental complaint fail to state a claim upon which relief can be granted; that it appears from the face of the complaint and the supplemental

complaint and the proceedings had before the Deputy Commissioner, that the plaintiff is not entitled to the relief demanded in his complaint or supplemental complaint by reason of the fact that the testimony produced before the Deputy Commissioner at the various hearings held before him were and are sufficient to sustain the award made by the Deputy Commissioner herein; and further, that the Deputy Commissioner in his award of February 15, 1940 ordered that the employer and insurance carrier furnish the plaintiff treatment by a psychiatrist for the cure of his disability; that pursuant to such order and award, plaintiff herein submitted himself to Dr. Henry Dixon, a competent psychiatrist in the City of Portland, for treatment [22] on the 22nd day of March, 1940, and Dr. Dixon has treated the plaintiff ever since said date at least twice each week and the plaintiff has continued to take treatments from Dr. Dixon and the plaintiff has therefore acquiesced in the award and order made by the Deputy Commissioner on February 15, 1940.

Dated September 12, 1940.

**WILBUR, BECKETT, HOWELL &
OPPENHEIMER,**

Attorneys for Defendants, Fireman's Fund Insurance Company, Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company.

I, H. B. Beckett, one of the attorneys for the above named defendants, Fireman's Fund Insur-

ance Company, Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company, hereby certify that the above motion in my opinion is well founded in law.

H. B. BECKETT

[Endorsed]: Filed September 12, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [23]

And Afterwards, to wit, on the 12th day of September, 1940, there was duly Filed in said Court, Motion of Wm. A. Marshall, etc., to Dismiss Suit in words and figures as follows, to wit: [24]

[Title of District Court and Cause.]

MOTION TO DISMISS SUIT

Comes now the defendant, Wm. A. Marshall, Deputy Commissioner 14th Compensation District, U. S. Employees Compensation Commission, and moves the Court for an order dismissing the above entitled suit for the reason and upon the grounds that both the original complaint and the supplemental complaint fail to state a claim upon which relief can be granted; that it appears from the face of the complaint and the supplemental complaint and the proceedings had before the Deputy Commissioner, that the plaintiff is not entitled to the relief demanded in his complaint or supplemental complaint by reason of the fact that the testimony produced before the Deputy Commissioner at the various

hearings held before him were and are sufficient to sustain the award made by the Deputy Commissioner herein; and further, that the Deputy Commissioner in his award of February 15, 1940 ordered that the employer and insurance carrier furnish the plaintiff treatment by a psychiatrist for the cure of his disability; that pursuant to such order and award, plaintiff herein submitted himself to Dr. Henry Dixon, a competent psychiatrist in the City of Portland, for treatment on the 22nd day of March, 1940, and Dr. Dixon has treated the plaintiff ever since said date at least twice each week and the plaintiff has continued to take treatments from Dr. Dixon and the plaintiff has there- [25] fore acquiesced in the award and order made by the Deputy Commissioner on February 15, 1940.

Dated September 12, 1940.

CARL C. DONAUGH,

Attorney for defendant, Wm. A. Marshall, Deputy
Commissioner 14th Compensation District,
U. S. Employees Compensation Commission.

[Endorsed]: Filed September 12, 1940. G. H.
Marsh, Clerk. By F. L. Buck, Chief Deputy. [26]

And Afterwards, to wit, on the 7th day of March, 1940, there was duly Filed in said Court, a Compensation Order of Wm. A. Marshall, Deputy Commissioner, in words and figures as follows, to wit:

[27]

United States Employees' Compensation
Commission

Fourteenth Compensation District

Case No. 431-6

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers' Com-
pensation Act.

G. Pletz,

Claimant;

against

SS "West Planter" and/or Chas. R. McCormick
Lumber Company of Delaware and/or McCor-
mick Steamship Company,

Employer;

Fireman's Fund Insurance Company,

Insurance Carrier.

COMPENSATION ORDER. REJECTION OF
CLAIM FOR COMPENSATION. DETER-
MINATION RELATIVE TO MEDICAL
CARE

Such investigation in respect to the above entitled
claim having been made as is considered necessary,
and a hearing having been duly held in conformity
with law, a compensation order and award of com-
pensation was filed by the Deputy Commissioner
on July 29, 1937, said order rejecting the claim of
the claimant above named for the reason that the

claim for compensation was not filed within one year after the injury.

Thereafter the claimant filed in the District Court of the United States for the District of Oregon an application for a review of the said order.

On February 23, 1939, the said court filed an order directing that the matter be referred back to the Deputy Commissioner for specific findings covering each and every issue made by the respective parties. Pursuant to said order a further hearing was held on March 17, 1939, and continued on May 13, 1939, and July 16, 1939 and

The Deputy Commissioner makes the following

FINDINGS OF FACT:

On November 12, 1935, the claimant above named was in the employ of the employer above named at Portland, in the State of Oregon, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the [28] liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company.

On the said day the claimant above named was employed as a longshoreman on board the Steamship "West Planter", said steamship being then at Portland, in the State of Oregon.

While the claimant was engaged in stowing empty drums in the hold of the said steamship a drum fell from a slingload striking his back, causing injury and resulting in his disability.

The claimant was immediately taken to a hospital where he remained until December 24, 1935. Within 14 days after injury a representative of the employer and insurance carrier called at the hospital and offered to the claimant the first instalment payment of compensation as required by the Act. The claimant refused to accept the offered payment because he believed he was entitled to receive more compensation per week than the amount offered to him.

After leaving the hospital the claimant consulted an attorney with reference to a possible action against a third party on account of the claimant's injury.

From time to time the claimant conferred with the representative of the insurance carrier. At these conferences the parties discussed the settlement of compensation liability by the payment of a lump sum, instead of by instalment payments. The record is conflicting as to whether the insurance representative or the claimant suggested the payment of a lump sum. The record, shows, however, that the insurance representative again offered to pay to the claimant compensation in instalments and that this offer was again refused. The record shows that the insurance representative knew that no settlement of compensation by payment of a lump sum could be made without the approval of the Deputy Commissioner and the United States Employees' Compensation Commission, and that in no event could

approval of a lump sum payment be secured for any amount less than that provided by the Act.

The claimant again returned to the hospital for treatment on February 12, 1936, and remained there until March 13, 1936. While in the hospital he conferred with the attorney now representing him in the present proceeding. The said attorney advised him at that time: "There is no third party case", and also advised him that he should accept compensation. He also conferred with the said attorney several times thereafter.

Following his injury the claimant was furnished with hospital, medical and surgical care from time to time by the employer and insurance carrier, and the medical and surgical care continued at the time of the hearing on July 23, 1937. [29]

No compensation was paid to or accepted by the claimant and on April 20, 1937, the claimant filed a formal claim in the office of the Deputy Commissioner, or more than one year after his injury.

The questions at issue in this proceeding are: (1) The claimant contends that the representative of the insurance carrier made promises to the claimant which misled him and because of this the carrier waived the limitation of one year within which a formal claim must be filed under the Act, and (2) that the claimant is entitled to appropriate medical, surgical and hospital care required by his injury irrespective of the filing of the formal claim.

(1) The claimant herein, following his injury, contemplated bringing an action against a third

party. He consulted an attorney with that purpose in mind. On at least two occasions he was offered instalment payments of compensation as is required by the Act and refused to accept same. Later he consulted another attorney at several different times who advised him to accept compensation. The record fails to show that the claimant was misled or overreached by the employer or insurance carrier.

(2) Section 7 (a) of the Longshoremen's and Harbor Workers' Compensation Act provides that "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." The right of the claimant to receive medical, surgical and other treatment for his injury is not affected by his failure to file a claim for compensation for disability within one year after the injury under the provisions of Section 13 (a) of the Act. Following the last hearing in this matter the Deputy Commissioner authorized an examination by a specialist, whose conclusions were as follows:

"I can find nothing objectively wrong with this man. His history as given is variable and he changes his statements from time to time. He seems sincere in the belief that he is suffering from an ill and I think, therefore, he should be classed more as a psychoneurotic than as an actual malingerer. I see no indication for medical treatment unless it should be psychiatric treatment given by a psychiatrist. It

is my impression that his psychoneurosis will be difficult to get rid of."

Upon the foregoing facts it is ordered by the Deputy Commissioner that the claim of the claimant herein for the payment of compensation be and it is hereby Rejected for the following reasons:

(1) That the said claim was not filed within one year after the injury, and (2) That the [30] claimant has not been misled or overreached by the employer or insurance carrier.

Upon the foregoing facts it is ordered by the Deputy Commissioner that the employer and insurance carrier furnish the claimant treatment by a psychiatrist for the cure of his disability.

Given under my hand at Seattle, Washington, this 15th day of February, 1940.

WM. A. MARSHALL,
Deputy Commissioner,
Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing Rejection of Claim and Determination was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mr. G. Pletz, 1915 S. W. Eleventh Avenue, Portland, Oregon.

SS "West Planter" and/or Chas. R. McCormick Lbr. Co. of Delaware, Foot of N. W. Irving St., Portland, Ore.

Fireman's Fund Ins. Co., c/o David C. Pickett,
410 Mead Bldg., Portland, Ore.

Wilbur, Beckett, Howell & Oppenheimer, Board
of Trade Bldg., Portland, Ore.

Wm. P. Lord, Atty., Suite 403, 317 S. W. Alder
St., Portland, Ore.

WM. A. MARSHALL,
Deputy Commissioner.

Mailed February 15, 1940.

WAM:MF

[Endorsed]: Filed March 7, 1940. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [31]

And Afterwards, to wit, on the 6th day of March,
1941, there was duly Filed in said Court, an Opinion
of Judge McColloch on October 24, 1940, in words
and figures as follows, to wit: [32]

[Title of District Court and Cause.]

Portland, Oregon, Thursday, October 24, 1940.
10:00 o'clock A. M.

Before:

Honorable ~~Claude~~ McColloch, Judge.

Appearances:

Mr. Wm. P. Lord, of Attorneys for the Plain-
tiff;

Mr. Harry B. Beckett, of Attorneys for De-
fendants.

PROCEEDINGS.

The Court: Mr. Lord and Mr. Beckett, in that Pletz matter, I have carefully gone over the record, which, by the way, is not [33] completed. I take it all the testimony that was taken before the Commissioner has been brought up here, but very few of the documents referred to in the testimony and in the briefs are in the file. I asked Mr. Marsh to write to the Deputy Commissioner and have him send us up the rest of his file and we received two reports by Dr. Burkes in 1936, but that still leaves a whole lot of things that are referred to in the transcript and in the briefs unaccounted for.

Incidentally, this whole procedure of how those records get up here and how they are authenticated is quite unsatisfactory, it seems to me.

Now I don't find anywhere, and I have looked for it carefully, any statement by anybody that Pletz's attention was called to the fact that he had a year within which to file his claim. Now I know you generally say, and it is no doubt sound, that ignorance of the law is no excuse, but my feeling in this case is that this man being, to a degree anyhow, a mental case—and that is established, at least to my satisfaction, by such portions of the original record as have come up here; these two reports that came up here from Dr. Burkes in 1936 emphasize that to my mind, at least, and the fact that he was being sent to Dr. Burkes, who I understand specializes in mental diseases, of course indicates the same thing; and the fact that the conversations, the discussions, were

continued with him after the year elapsed about the possibility of a lump sum settlement, the fact that the notice [34] of claim was mailed after the year for him by Mr. Pickett's office,—all of those things taken together make me feel that the man was entitled to notice in some way that his year was running on him and that he had only a year, and I feel that it would be an injustice to deny him compensation because he didn't file within a year.

Now there are some circumstances that are more disturbing than usual in the case, and I feel that it is my duty, and justice demands, that I set aside the Commissioner's order, but as to what findings I should or may make, or what expressions I shall put in the record other than what I am saying here now, I will be glad, Mr. Beckett—and you, Mr. Lord, are interested in doing that—to discuss that further with you, and more informally, some time.

In that connection, I think we should have in mind the recent expressions by the Circuit Court of Appeals that in trying these cases as equity suits we have been "off the boat." That case, Mr. Beckett, that you relied on, or one of the cases that you relied on as to the filing of the claim within a year, deals with that practice point. But what I have in mind is purely technical, as to what I should say, or what I need to say on the record about this. I would like to have the benefit of your advice and discussion with you.

Mr. Beckett: In so far as your Honor states the procedure followed in reference to sending up the

record here, I think in all of these matters it is more or less unsatisfactory. Now as I [35] understand it, the Act provides, or rule of the Commission, I have forgotten which, that when a suit is filed, such as was done in this case, that it is the duty of the Deputy Commissioner to file his entire file with the clerk of this Court. Now if that has not been done, thinking that I probably will take an appeal in this matter, I would like to take up with Mr. Marshall the omission of such portions of the record as are not fully in here; I mean to get them in the Court before the final order is entered.

The Court: I quite agree with you.

Mr. Beckett: I mean to get the entire record here.

The Court: I agree with you that all of those ought to be here.

Mr. Beckett: Yes.

The Court: And they are not here now.

Mr. Lord: Some way, it seems to me, your Honor, that the record was here, particularly the letters your Honor referred to. I don't know where else I would have got copies of those letters, unless I got them out of the record here.

Mr. Beckett: You see, it might have been when it was sent back to Mr. Marshall for the further hearing. I don't know but I assume that Mr. Marsh here, when the matter was referred back to Mr. Marshall, probably sent back his entire file; I mean whatever had been filed here by Mr. Marshall. Does the file show anything, Mr. Marsh, in that regard?

Mr. Marsh (The Clerk): I would have to check my vouchers. [36]

Mr. Beckett: Well, the file may show what Mr. Marsh sent back to Mr. Marshall. Anyway, we will run that down.

The Court: It is not here today, gentlemen. I want to save some time. I left it home today; I forgot to bring it down. I am sorry to have asked you up here this morning, but I didn't know of any other way to do it.

Mr. Beckett: Yes. That is all right.

(Above Matter concluded at 10:16 o'clock A. M.)

[Endorsed]: Filed March 6, 1941. G. H. Marsh, Clerk. E. A. Landis, Deputy. [37]

And Afterwards, to wit, on the 29th day of July, 1941, there was duly Filed in said Court, a Stipulation Re- Findings of Fact, Conclusions of Law and Decree, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

STIPULATION.

Whereas in Paragraph V of the Court's Findings of Fact, and in Paragraph III of the Court's Conclusions of Law, and in Paragraph two of the Decree made and entered in the above cause the Court refers to the findings or award or supplemental award or Order made by the Deputy Commissioner, on the 14th day of February, 1940, and Whereas the true date of said findings or award

or supplemental award or Order was the 15th day of February, 1940, and

Whereas the error in said date was made by the Court through inadvertence,

It Is Hereby Stipulated and Agreed by and between the parties to the above cause through their respective attorneys, that wherever in Findings of Fact, Conclusions of Law and Decree of the Court made and entered in the above cause it is stated that the said findings or award or supplemental award or Order of the said Deputy Commissioner were made or filed on the 14th day of February, 1940, that said date may be changed to the 15th day of February, 1940.

Dated this 29th day of July, 1941.

W. P. LORD

Attorney for Plaintiff.

CARL C. DONAUGH

WILBUR, BECKETT,

HOWELL & OPPENHEIMER

Attorneys for Defendants.

[Endorsed]: Filed July 29, 1941. G. H. Marsh,
Clerk. [39]

And Afterwards, to wit, on Tuesday, the 15th day of April, 1941, the same being the 38th Judicial day of the Regular March, 1941, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [40]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I.

The Court finds that during all the times herein mentioned, the defendant Wm. A. Marshall was the duly appointed, qualified and acting deputy commissioner for the 14th Compensation District, United States Employees Compensation Commission, administering the Longshoremen's and Harbor Workers' Compensation Act.

II.

The Court finds that during all the times herein mentioned, the defendant Firemen's Fund Insurance Company was, and now is, a corporation, organized and existing under the laws of the State of California, and engaged in writing policies of compensation insurance agreeing to pay the benefits to injured longshoremen.

III.

That on the 12th day of November, 1935, the above plaintiff, G. Pletz, was in the employ of the McCormick Steamship Company, a corporation, the owner and/or operator of the West Planter, a merchant vessel which was then lying in the navigable waters of the Willamette River at Portland, in the State of Oregon, and within the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that [41] liability of the employer for

compensation under said Act was insured by Fireman's Fund Insurance Company, one of the defendants herein.

IV.

On November 12, 1935, plaintiff, a longshoreman, while so employed, and while working in one of the cargo holds, loading the vessel West Planter, a merchant ship lying in the navigable waters of the Willamette River and docked at the employer's dock in the Port of Portland, sustained certain personal injuries by being struck on the neck, shoulder and side by cargo which fell from the loading equipment while being hoisted out of the hold.

V.

A claim for compensation was filed by Pletz on the 19th of April, 1937. A notice to the Deputy Commissioner that the claim would be controverted was filed on May 6, 1937. Hearing was had before the Deputy Commissioner on July 23, 1937. An order rejecting the claim was made by the Deputy Commissioner on July 29, 1937. A proceeding to review the order by injunctive process was filed, issue was made and a hearing was had before the court. On February 23, 1939, after reviewing the record certified to the court by the Deputy Commissioner, and hearing oral argument of counsel, and considering briefs submitted by both sides, the court entered an order directed to the Deputy Commissioner to make specific findings. Further testimony was taken at hearings before the Deputy Commissioner on

March 17, 1939, May 13, 1939 and June 19, 1939. On the 14th day of February, 1940, the Deputy Commissioner filed findings and made an award, rejecting the claim, and directed that further medical care be allowed Pletz.

V (a)

The court finds that no compensation was paid or accepted by the plaintiff by reason of his said injuries, and that on the 20th day of April, 1937, more than one year after his said injury, the [42] plaintiff filed a formal claim in the office of said deputy commissioner, Wm. A. Marshall, which claim was controverted by the defendant employer and the defendant insurance carrier.

V (b)

The court finds that the deputy commissioner rejected the claim of the plaintiff on the ground that said claim had not been filed within one year after the date of plaintiff's injury as required by said Compensation Act, and the said deputy commissioner also rejected the claim of the plaintiff that the insurance carrier should be estopped from asserting the bar of the statute or that by the course of dealing of said insurance carrier it had waived the provisions of said Compensation Act requiring that a claim be filed within one year after injury and that said deputy commissioner further found that the plaintiff herein "has not been misled or over-reached by the employer or insurance carrier."

V (c)

The court further finds that the said deputy commissioner in his award of February 15, 1940 ordered that the employer and the insurance carrier furnish the plaintiff treatment by a psychiatrist; that pursuant to such order and award, plaintiff herein submitted himself to Dr. Henry Dixon, a competent psychiatrist in the City of Portland, Oregon, for treatment on the 22nd day of March, 1940, and that thereafter, pursuant to said order and award, the said plaintiff has continued to take treatments from said Dr. Dixon.

VI.

A supplemental complaint for injunction was then filed by Pletz and issue has been joined, and the claim is now before the court upon the entire record made before the Deputy Commissioner.

VII.

The rejection order of the Deputy Commissioner, dated July 29, 1937, was predicated on the grounds urged by the insurance [43] carrier that the injured man did not file a claim within one year from the date of the injury, and the proceedings on his behalf before the Deputy Commissioner and for review were predicated on the grounds that the insurance carrier should be estopped, through the conduct of its representatives handling the claim, from asserting the bar of the statute, and that by their course of dealing with him and with the Deputy

Commissioner, the insurance carrier has waived the provisions of the Act requiring that a claim be filed within one year after the injury (Section 13-a, Longshoremen's and Harbor Workers' Compensation Act.)

VIII.

I find from the record and evidence adduced before the Deputy Commissioner on the several hearings, that both of these contentions made by the claimant are well taken. I come to this conclusion from the course this injured man's rights took after his injury.

IX.

The court finds that immediately upon suffering said injuries plaintiff was taken to a hospital where he remained until December 24th, 1935; that the said insurance carrier secured information relative to the amount of plaintiff's earnings during the year immediately preceding his injury in order to tender to plaintiff the amount of compensation he was entitled to under the said Longshoremen's and Harbor Workers' Compensation Act, and that on the 26th day of November, 1935, the said insurance carrier tendered to the plaintiff the compensation it felt he was entitled to, but that the plaintiff refused to accept the compensation so tendered to him because he thought he was entitled to a higher rate of compensation per week than the amount so offered to him; that on various occasions thereafter the said insurance carrier offered to pay to the said plaintiff the amount it thought he was entitled to under the said

compensation act, but that plaintiff at all times [44] prior to the expiration of one year after the date of his injury refused to accept the amounts so offered to him, and that the representative of said carrier, as well as Wm. A. Marshall, the Deputy Commissioner, one of the defendants herein, informed the said plaintiff that the amount of compensation he was entitled to under said Compensation Act was based upon the amount of his earnings prior to said injury and that the amount of said earnings could be ascertained by referring to the payroll records, which, as he was advised by the Deputy Commissioner, were accessible to him, and that the said plaintiff refused the compensation payments offered to him by said insurance carrier, notwithstanding the said insurance carrier, acting through its authorized representative, informed him that if he accepted said amounts so offered and it subsequently developed that he was entitled to a higher rate of compensation, an adjustment could be made. In this connection, I also find that said offers of compensation were made prior to the expiration of one year from the date of said injury.

X.

The court further finds that prior to the expiration of one year following said injury the said plaintiff consulted with various lawyers relative to his rights growing out of his said injury; that the said plaintiff contemplated bringing a third party case or an action against his employer; that one of the

lawyers consulted by plaintiff advised him that he did not have a third party action, and that he should accept compensation. That prior to said one year period the said plaintiff also interviewed the defendant Deputy Commissioner, Wm. A. Marshall, relative to his rights growing out of said injury and received advice from said Commissioner in regard thereto.

XI.

Three days after the accident a legal representative of the insurance carrier called on Pletz at his hospital and obtained a [45] statement of the facts of the accident. One of the purposes in securing this statement was disclosed when the attorney was called upon to testify at several hearings held before the Deputy Commissioner, and testified that he had in mind that Pletz might make a third party claim. He further testified that "as soon as that accident occurred we are faced with three possible claims. One is a claim under the Longshoremen's and Harbor Workers' Act, the other is a possible third party claim, and the other is a possible suit against the employer in spite of the act," and that he represented the insurance carriers that would have had to defend all of such claims, had Pletz determined to make a liability claim, and if suit had been involved on any one of those claims, he, as attorney, would have been involved in the defense of it.

XII.

Pletz was in the employ of the steamship company and the circumstances of the accident and the rela-

tionship of Pletz to the employer precluded a third party claim, or any claim for damages independent of the Longshoremen's and Harbor Workers' Compensation Act, and no election to seek a remedy against a third party has been made.

I find that at an early date and continuing throughout the negotiations, Pletz thought that he had a right to a settlement independent of the Act. He testified that he had obtained legal advice that "the (Compensation) Act could be broken".

XIII.

I find that Pletz after the accident developed a marked neurosis; he was disturbed about the seriousness of his injuries. The report of the attending doctor filed with the Deputy Commissioner on the 19th of November, 1935, found that the X-rays were negative as to fracture, but he had sustained a contused back. A letter from the [46] attorney handling the claim, dated November 6, 1936, in answer to an inquiry from the Deputy Commissioner as to the present status of the claim, says:

"I have your letter of November 5, 1936. This is to advise you that at the present time Mr. Pletz claims to be suffering from certain subjective symptoms. The doctors by whom I have had him examined and under whose treatment he has been have been unable to find any objective symptoms, and have advised me that he is not really disabled. Recently, however, I put him under the care of Dr. Leon Goldsmith

with a request to Dr. Goldsmith to examine him thoroughly with the view of determining his true physical condition. I have not had a report from Dr. Goldsmith."

XIV.

A letter dated March 8, 1937, from the attorney, in response to an inquiry, informs the Deputy Commissioner as follows:

"I have your inquiry of March 2, 1937, inquiring as to the status of this claim subsequent to our letter of November 6, 1936. I beg to state that this man still claims to be suffering from disability resulting from the accident. None of the doctors to whom I have sent him can verify his claims of disability. From my conversation with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and to secure from me an agreement for perpetual medical care."

It is clear to the court that Pletz's condition caused him much pain, nervousness and mental perplexity, and that his injuries have affected his mental processes. I come to this conclusion from the evidence taken at the several hearings held before the Deputy Commissioner, and the fact that the Deputy Commissioner, as a result of the hearing held on July 23, 1939, on the application for continued medical treatment, ordered that the insurance carrier furnish further medical treatment.

XV.

When eventually Pletz called at the law office and discussed the matter as to the rate of pay that he should receive for compensation, Pletz said that he knew that some injured men were getting as much as \$25 a week, and that he had earned as high as \$50. per week, and he did not understand why he should not receive as much as these other injured employees, with whom he was acquainted. It was [47] suggested by the legal representative that the amount might be raised, and upon a subsequent discussion he attempted to discuss with the legal representative the amount of compensation that he should receive. It was at one of these conferences that he stated that he was asking "if he could not get some kind of an agreement. I did need money but I did not want to let the doctor go." And he says that the legal representative stated that he would rather make a settlement than pay Pletz compensation. On examination Pletz was pressed on this point and he stated that the settlement was to be a lump sum and a final settlement, and Pletz stated to the legal representative that he did not want to make a final settlement because "I did need the doctors and we didn't get to no agreement, see?" and throughout his examinations it appears that Pletz's insistence to have continued doctors' care was in Pletz's mind at least, a stumbling block to any settlement, and he says, "Well, I just let it go along like that." These conversations took place around

the first of the year 1936, at which time Pletz says that he told the attorney in answer to his inquiry, "Why don't you take compensation?" that he would take it if they would give him a little more. Pletz was returned to the hospital on the 12th day of February, 1936, and was released from the hospital on the 13th day of March, 1936, and he again called at the law office and consulted with the attorney for the carrier, and the discussions about a settlement were resumed. He stated that they were willing to "settle" but were not willing to give him doctors' care.

XVI.

There were also discussions between the claimant and the legal representative relating to the payment of a money settlement and a job on the Company's dock. This was broached by Pletz, and before the Deputy Commissioner the attorney disclaimed that he had authority to give any injured employee a job, and told [48] Pletz so.

XVII.

The evidence shows that Pletz did not request a settlement of his claim until about the middle of March, 1936, and from that time forward Pletz and a member of the law firm were in continual discussion, about what arrangements could be made for the settlement of the claim for the injury by the payment of a lump sum. It appears from the testimony that these discussions were not an occasional matter, but that Pletz frequently called on the mem-

ber of the firm who had the matter in hand and conversed with him upon what terms of settlement could be made, and on each occasion he left the office with the impression that it was not without the range of probability that a satisfactory settlement could be reached by further negotiations, and I find from the evidence that the reason the claim was not disposed of before the expiration of one year from the date of the accident, when the claim would outlaw, was due to the continuing discussions.

XVIII.

The court finds that the dealings between the insurance carrier's representatives and Pletz were such as to mislead Pletz with respect to his right to apply for and receive compensation at any time he desired to apply for it.

XIX.

There was information by notice of the accident given to the Deputy Commissioner that compensation was being paid Pletz without controversy or denial of the right to compensation, and without awaiting an award, to use the language of the Act, and it would appear to the court that the spirit of the Act would require the Deputy Commissioner [49] to make an investigation why Pletz was not accepting compensation, which the Deputy Commissioner sought to do by his letter of November 5, 1936. The inquiry made by the Deputy Commissioner remained unanswered.

XX.

The Deputy Commissioner, on November 5, 1936, wrote the attorneys for the insurance carrier inquiring as to the status of the claim. The letter was answered by the member of the firm having charge of the claim on November 6, 1936, making no mention that the man had continued to refuse or accept the compensation, but stated that "Mr. Pletz claims to be suffering from certain subjective symptoms," and continues, "doctors who have examined him have been unable to find any objective symptoms and have advised me that he is not really disabled," and that recently he had put him under the charge of Dr. Leon Goldsmith, with request, to examine Pletz thoroughly, "with a view of determining his true physical condition."

XXI.

The letter of the Deputy Commissioner called for information as to whether or not Pletz had been receiving compensation payments in the face of his previous rejection or refusal to accept the payments. The Deputy Commissioner did not receive this letter prior to the 7th, which left only four days' time within which a claim could be filed, and the letter undoubtedly led the Deputy Commissioner to believe that compensation was being paid, and the only question for his consideration was the extent of the disability of the claimant. I deduce from the testimony of Mr. Marshall, the Deputy Commissioner, that had he known that the time to

file Pletz's claim would expire on the 12th for failure to file a claim, or that the payment of compensation would have been refused for the failure to file a claim by claimant, he, as administrator of the Act, would have advised Pletz of the necessity of protecting his [50] rights by filing a claim prior to the 12th of November, 1936.

XX.

In discussing his claim with a member of the law firm representing the insurance carrier, Pletz remarked that he did not want to cause any trouble, although he threatened at times to make trouble unless he was given a settlement satisfactory to him. I find that he was confused, and that his confusion was increased by numerous discussions with a member of the law firm of the insurance carrier in relation to his rights, and by the advice he had received from other attorneys with regard to the possibility of "breaking the Act." The attorney for the insurance carrier testified that from his observations of Pletz and the medical reports that he had received from physicians (who numbered five at this time, not including the services of Dr. Firth, a chiropractor), he did not believe Pletz had suffered any real disability beyond April, 1936, and at this time he was able to return to work. He also testified that in September, 1936, the insurance carrier requested that no further medical attention be given Pletz on the defendant insurance carrier's account, and he so notified Dr. Belknap, who had charge of

the medical care. But medical attention by the insurance carrier's physicians was continued after September, 1936, and for many months after the 12th of November, 1936, when the time for filing the claim expired.

XXIII.

It is uncontradicted that Pletz was given no notice that these medical services were being withdrawn on the insurance carrier's account, and that the medical services extended to him thereafter were on his own account, or on other account. But, on the contrary, the evidence shows that Pletz was a persistent and aggressive patient in attendance upon Dr. Belknap, and that he was without funds to pay for such services, which must have been known to Dr. Belknap. Dr. Belknap was not called as a witness. [51]

XXIV.

For long after the statutory time for filing the claim, Pletz was permitted by the attorney for the insurance carrier to come to his office and discuss settlement with or without medical care in the future, and "inquiries" as to the "amount he would take", and what authority the attorney could secure to make settlement, and what amount the home office could consider. (1) That the discussions were continued with plaintiff after a year elapsed about the possibility of a lump sum settlement. (2) That the notice of claim was prepared for the plaintiff in Mr. Pickett's office after the year had elapsed. (3) That Pletz was not advised that he had only a year

within which to file his claim, even though the discussions were continued after the lapse of a year. (See pages 2 and 3 of oral opinion from the bench on October 24, 1940).

XXV.

I find that the discussions were conducive to creating a belief in the mind of the claimant that he could, by continued negotiations, eventually effect a settlement by cash payment. This directly induced the man not to perfect his claim.

XXVI.

It was stipulated between the attorneys at the hearing before the Deputy Commissioner on July 23, 1937, that if an appeal was taken by claimant from an adverse finding and award of the Deputy Commissioner, then the case should be remanded by the court to the Deputy Commissioner to determine the amount of compensation due claimant and all other questions relating to the extent and duration of disability, which would include the attorney fees that claimant's attorneys would be entitled to receive for their services in connection with proceedings in relation to the claim. I find that this stipulation is fair to the claimant, and it is hereby approved.

CLAUDE McCOLLOCH

Judge.

Dated April 15, 1941. [52].

CONCLUSIONS OF LAW**I.**

That the insurance carrier is estopped to assert that the claim herein was not timely filed.

II.

That the insurance carrier waived the provisions of the Act requiring that a claim be filed within one year after the injury. (Section 13-a, Longshoremen's and Harbor Workers' Compensation Act).

III.

The plaintiff is entitled to an order and decree, directed to the Deputy Commissioner, to set aside the orders made by him on July 29, 1937, and supplemental award made on February 14, 1940, rejecting plaintiff's claim, and making certain findings thereon.

IV.

That a further order should be entered, directed to the Deputy Commissioner, to reject the controversial filed by the employer and the insurance carrier.

V.

That an order should be entered, directed to the Deputy Commissioner, that plaintiff's claim filed on April 10, 1937, be held to be in all respects a valid claim for compensation, and that the defendants be and are estopped from asserting contrariwise.

VI.

That the Deputy Commissioner proceed to determine the amount of compensation which plaintiff is entitled to be paid for temporary total disability, the duration of any temporary total disability sustained by plaintiff, and the extent, if any, of the permanent partial disability sustained by plaintiff.

VII.

That the Deputy Commissioner fix plaintiff's attorney fee in the manner provided by law.

VIII.

That plaintiff should have his costs and disbursements incurred herein.

Dated April 15, 1941.

CLAUDE MCCOLLOCH

Judge.

[Endorsed]: Filed April 15, 1941. G. H. Marsh,
Clerk, By E. A. Landis, Deputy. [53]

And Afterwards, to wit, on Tuesday, the 15th day of April, 1941, the same being the 38th Judicial day of the Regular March, 1941 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [54]

In the District Court of the United States
For the District of Oregon

No. E-9707

G. PLETZ,

Plaintiff.

vs.

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission; FIREMAN'S FUND
INSURANCE COMPANY, a corporation;
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation; and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Defendants.

DECREE

And now, to-wit, on the 15th day of April, 1941,
this case having been heard upon the pleadings and
the record certified to by Wm. A. Marshall, Esq.,
Deputy Commissioner, 14th Compensation District,
U. S. Employees Compensation Commission, and
after argument by the proctors and the respective
parties, and due deliberation thereon being had, and
the court having heretofore made its Findings of
Fact and Conclusions of Law, and upon considera-
tion thereof, now on motion of plaintiff's attorneys
for a decree in conformity with said Findings of
Fact and Conclusions of Law,

It Is Ordered and Adjudged that the defendant
Wm. A. Marshall, Deputy Commissioner, be and

he hereby is directed to set aside the orders made by him on July 29, 1937 and February 14, 1940, rejecting plaintiff's claim;

It Is Further Ordered that the defendant Wm. A. Marshall, as such Deputy Commissioner, be and he hereby is directed to reject the controversial filed by the defendant employer and insurance carrier.

It Is Further Ordered that plaintiff's claim for compensation, filed on April 10, 1937, be and the same hereby [55] is declared to be in all respects a valid claim for compensation, and that defendants be and they hereby are estopped from asserting contrariwise.

It Is Further Ordered that the defendant Wm. A. Marshall, as such Deputy Commissioner be and he hereby is directed to determine the amount of compensation which plaintiff is entitled to be paid for temporary total disability, the duration of any temporary total disability sustained by plaintiff, and the extent, if any, of the permanent partial disability sustained by plaintiff.

It Is Further Ordered that the attorney fees of plaintiff's attorneys be fixed by the defendant Wm. A. Marshall, as such Deputy Commissioner, and that plaintiff have of and recover from defendants his costs and disbursements incurred herein.

Dated April 15, 1941.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed April 15, 1941. G. H. Marsh,
Clerk. By E. A. Landis, Deputy. [56]

And Afterwards, to wit, on the 7th day of July, 1941, there was duly Filed in said Court, Exceptions to Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [57]

[Title of District Court and Cause.]

**EXCEPTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE COURT.**

Come now the defendants above named and except to certain portions of the Findings of Fact and Conclusions of Law filed by the Court herein as follows:

II.

Defendants—except to the following purported Finding of Fact, being the Court's Finding of Fact No. VIII, to-wit:

“I find from the record and evidence adduced before the Deputy Commissioner on the several hearings, that both these contentions made by the claimant (estoppel and waiver) are well taken, and there is no substantial evidence in the record that would justify any other conclusion. I come to this conclusion from the course this injured man's rights took after his injury;”

for the reason that said Finding is contrary to the evidence and contrary to the law, and for the further reason that the said Deputy Commissioner found “That the claimant has not been misled or overreached by the employer or insurance carrier,” and

that said Finding by said Deputy Commissioner is supported by substantial evidence and, therefore, this Court is bound by such Finding.

IX.

Defendant's except to the following finding of fact, being a portion of the Court's Finding of Fact No. XIV:

"that this condition caused Pletz great pain, ner- [58] viousness and mental perplexity * * ;"

for the reason that there is substantial evidence to the contrary in the record and this Court has no authority, under such circumstances, to make a finding contrary to those of the Deputy Commissioner.

XIV.

Defendants except to the following so-called finding of fact, being a portion of the Court's Finding of Fact No. XV, to-wit:

"It was at one of these conferences that he (plaintiff) stated that he was asking 'if he could not get some kind of an agreement. I did need money but I did not want to let the doctor go.' And he says that the legal representative stated that he would rather make a settlement than pay Pletz compensation. On examination Pletz was pressed on this point and he stated that the settlement was to be a lump sum and a final settlement, and Pletz stated to the legal representative that he did not want to make a final settlement because 'I did need the doctors and

we didn't get to no agreement, see?' and throughout the long examinations it definitely appears that Pletz's insistence to have continued doctors' care was in Pletz's mind at least, a stumbling block to any settlement, and he says, 'Well, I just let it go along like that.' These conversations took place around the first of the year 1936, at which time Pletz says that he told the attorney in answer to his inquiry, 'Why don't you take compensation?' that he would take it if they would give him a little more. * * He stated that they were willing to 'settle' but were not willing to give him doctor's care;

for the reason that said purported findings of fact are mere narrations of testimony and are not findings of fact. Defendants further except to said so-called findings of fact for the reason that the same are contrary to the evidence and are contrary to the law in that the evidence discloses that claimant was offered compensation by the representative of the carrier of the insurance but refused the same.

XV.

Defendants except to the following so-called finding of fact, being a portion of the Court's Finding of Fact No. XVII, to-wit:

"from that time forward Pletz and a member of the law firm were in continual discussion, if not negotiations about what arrangements could

be made for the settlement of the claim for the injury by the payment of a lump sum. It appears from the testimony that these discussions were not an occasional matter but that Pletz frequently called on the member of the firm who had the matter in hand and conversed with him upon what terms of [59] settlement could be made, and on each occasion he left the office with the impression that it was not without the range of probability that a satisfactory settlement could be reached by further negotiations, and I find from the evidence that the reason the claim was not disposed of before the expiration of one year from the date of the accident, when the claim would outlaw, was due to the continuing discussions;"

for the reason that said purported finding of fact is contrary to the evidence and contrary to the law.

XVI.

Defendants except to the following finding of fact, being the Court's Finding of Fact No. XVIII:

"The court finds that the dealings between the insurance carrier's representative and Pletz were such as to mislead Pletz with respect to his right to apply for and receive compensation at any time he desired to apply for it;"

for the reason that said finding of fact is contrary to the evidence and contrary to the law and also contrary to the findings of the Deputy Commissioner, by whose findings this court is bound.

XVII.

Defendants except to the following finding of fact, being a portion of the Court's Finding of Fact No. XIX, to-wit:

"it would appear to the court that the spirit of the Act would require the Deputy Commissioner to make an investigation why Pletz was not accepting compensation;"

for the reason that said findings of fact are contrary to the evidence and contrary to the law. That there is no duty upon the part of the Deputy Commissioner nor the insurance carrier to apprise a workman of the provisions of the Compensation Act relative to filing claims, especially when they know that said workman has been in consultation with attorneys of his own choosing.

XVII.

Defendants except to the following finding of fact, being a portion of the Court's Finding of Fact No. XXI:

"the letter undoubtedly led the Deputy Commissioner to believe that compensation was being paid, and the only question for his consideration was the extent of the disability of the claimant. We deduce from the testimony of Mr. Marshall, the Deputy Commissioner, that had he known that the time to file Pletz's claim would expire on the 12th for failure to file a claim by claimant, he, as administrator of the

Act, would have advised Pletz of the necessity of protecting his rights by filing a claim prior to the 12th of November, 1936;

for the reason that said findings of fact, or rather argument, are contrary to the evidence and contrary to the law, and for the further reason that the Deputy Commissioner knows more than any one else the purpose of his letter to the attorneys for the insurance carrier under date of November 5, 1936, and knows whether the answer to said letter under date of November 6th, 1936, was satisfactory; that the said Deputy Commissioner with such knowledge found that "claimant has not been misled or overreached by the employer or insurance carrier."

XIX.

Defendants except to the following finding of fact, being a portion of the Court's Finding of Fact No. XXII, to-wit:

"I find that he was confused, which confusion was increased by numerous discussions with a member of the law firm of the insurance carrier in relation to his rights;"

for the reason that said finding of fact is contrary to the evidence in that the representative of the insurance carrier endeavored to induce the claimant to accept the compensation he was entitled to under the Compensation Act, but that claimant refused to accept same, claiming the amount offered was too small; that notwithstanding the payroll records were

open to his inspection, and he was so informed, he failed at any time to submit figures showing that the amount offered by the insurance carrier was incorrect. That if there was any confusion in the mind of said claimant, it was due to the advice of his own lawyers and not due to anything said by the insurance carrier's representatives. [61]

XXI.

Defendants except to the following purported finding of fact, being a portion of the Court's Finding of Fact No. XXII:

"He also testified that in September, 1936, the insurance carrier requested that no further medical attention be given Pletz on the defendant carrier's account, and he so notified Dr. Belknap, who had charge of the medical care;" for the reason that said purported finding of fact is contrary to the evidence.

XXII.

Defendants except to the following finding of fact, being a portion of the Court's Finding of Fact No. XXIII:

"It is uncontradicted that Pletz was given no notice that these medical services were being withdrawn on the insurance carrier's account, and that the medical services extended to him thereafter were on his own account, or on other account;"

for the reason that said findings of fact are contrary to the evidence; that the evidence does not disclose that the insurance carrier withdrew medical services for the claimant.

XXIV.

Defendants except to the following findings of fact, being the Court's Finding of Fact No. XXV:

"the discussions * * * were conducive to creating a belief in the mind of the claimant that he could, by continued negotiations, eventually effect a settlement by cash payment. This directly induced the man not to perfect his claim;"

for the reason that said findings of fact are contrary to the evidence and contrary to the law."

The foregoing Exceptions to Findings of Fact and Conclusions of Law of the Court were lodged with me on March 31, 1941.

CLAUDE McCOLLOCH

District Judge.

[Endorsed]: Filed July 7, 1941. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [62]

And Afterwards, to wit, on the 7th day of July, 1941, there was duly Filed in said Court, Defendants' Requested Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [63]

[Title of District Court and Cause.]

**DEFENDANTS' REQUESTED FINDINGS OF
FACT AND CONCLUSIONS OF LAW.**

Come now the defendants in the above entitled cause and respectfully request the Court to make and enter the following Findings of Fact in said cause:

I.

The Court finds that during all the times herein mentioned, the defendant Wm. A. Marshall was the duly appointed, qualified and acting deputy commissioner for the 14th Compensation District, United States Employees Compensation Commission, administering the Longshoremen's and Harbor Workers' Compensation Act.

II.

The Court finds that during all the times herein mentioned, the defendant Firemen's Fund Insurance Company was, and now is, a corporation, organized and existing under the laws of the State of California, and engaged in writing policies of compensation insurance agreeing to pay the benefits to injured longshoremen.

III.

That on the 12th day of November, 1935, the above plaintiff, G. Pletz, was in the employ of the McCormick Steamship Company, a corporation, the owner and/or operator of the West Planter, a merchant vessel which was then lying in the navigable

waters of the Willamette River at Portland, in the State of Oregon, and within [64] the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that liability of the employer for compensation under said Act was insured by Firemen's Fund Insurance Company, one of the defendants herein.

IV.

The court finds that on said 12th day of November, 1935, the said G. Pletz, plaintiff above named, was employed as a longshoreman on board of the said steamship West Planter, while said steamship was docked in the said Willamette River in the City of Portland, Oregon, and that while the said plaintiff was engaged in stowing empty drums in the hold of said steamship, in the course of his employment, a drum fell from a slingload striking his back and causing the said plaintiff certain physical injuries.

V.

The court finds that immediately upon suffering said injuries plaintiff was taken to a hospital where he remained until December 24th, 1935; that the said insurance carrier secured information relative to the amount of plaintiff's earnings during the year immediately preceding his injury in order to tender to plaintiff the amount of compensation he was entitled to under the said Longshoremen's and Harbor Worker's Compensation Act, and that on the 26th day of November, 1935, the said insurance car-

rier tendered to the plaintiff the compensation it had ascertained he was entitled to, but that plaintiff refused to accept the compensation so tendered to him because he thought he was entitled to a higher rate of compensation per week than the amount so offered to him; that on various occasions thereafter the said insurance carrier offered to pay to the said plaintiff the amount he was entitled to under the said compensation act, based upon the information it had received relative to the prior earnings of the plaintiff, but that plaintiff at all times prior to the expiration of one year after the date of his [65] injury refused to accept the amounts so offered to him, and that the representative of said carrier, as well as Wm. A. Marshall, the Deputy Commissioner, one of the defendants herein, informed the said plaintiff that the amount of compensation he was entitled to under said Compensation Act was based upon the amount of his earnings prior to said injury and that the amount of said earnings could be ascertained by referring to the payroll records, which were accessible to him, but that the said plaintiff at no time submitted any figures showing that he was entitled to a higher rate of compensation than that offered to him by the insurance carrier, and that the said plaintiff refused the compensation payments offered to him by said insurance carrier, notwithstanding the said insurance carrier, acting through its authorized representative, informed him that if he accepted the

said amounts so offered to him and it subsequently developed that he was entitled to a higher rate of compensation, the acceptance of said amounts would not prejudice his rights to any greater amount it might thereafter develop he was entitled to, but that notwithstanding such fact the said plaintiff refused to accept said compensation offered to him by said insurance carrier, and in this connection I also find that said offers of compensation made to plaintiff were made prior to the expiration of one year from the date of said injury of plaintiff.

VI.

The court further finds that prior to the expiration of one year following said injury the said plaintiff consulted with various lawyers relative to his rights growing out of his said injury; that the said plaintiff contemplated bringing a third party case or an action against his employer, that one of the lawyers consulted by plaintiff advised him that he did not have a third party action, and that he should accept compensation; that the plaintiff gave the representative of the insurance carrier to understand that he [66] was represented by a lawyer and knew what he was doing, and that the representative of said insurance carrier was at all times warranted in assuming that the said plaintiff was acting under the advice of an attorney; that prior to said one year period the said plaintiff also interviewed the defendant Deputy Commissioner, Wm. A. Marshall, relative to his rights growing out of said injury and

received advice from said commissioner in regard thereto.

VII.

The court finds that at all times, with the possible exception of a few days immediately following his first operation, the plaintiff had full possession of his faculties and knew what he was doing and was capable of transacting his business affairs and was fully aware of the character and purpose of the compensation that was offered him by the insurance carrier, and that the testimony of the plaintiff at the various hearings before the Deputy Commissioner, as shown from the transcript thereof, discloses that the plaintiff is mentally alert, and the court further finds that the deputy commissioner, before whom plaintiff's claim was heard, found that "I can find nothing objectively wrong with this man," and that he could "see no indication for medical treatment", except that said deputy commissioner found that the plaintiff "seems sincere in the belief that he is suffering from an ill" and that said deputy commissioner found that possibly treatment by a psychiatrist might be of some benefit to said plaintiff.

VIII.

The court finds that no compensation was paid or accepted by the plaintiff by reason of his said injuries, and that on the 20th day of April, 1937, more than one year after his said injury, the plaintiff filed a formal claim in the office of said deputy commissioner, Wm. A. Marshall; which claim was

duly controverted by the defendant employer and the defendant insurance carrier.

IX.

The court finds that the deputy commissioner rejected the claim [67] of the plaintiff on the ground that said claim had not been filed within one year after the date of plaintiff's injury as required by said Compensation Act, and the said deputy commissioner also rejected the claim of the plaintiff that the insurance carrier should be estopped from asserting the bar of the statute or that by the course of the dealing of said insurance carrier it had waived the provisions of said Compensation Act requiring that a claim be filed within one year after injury and that said deputy commissioner further found that the plaintiff herein "has not been misled or overreached by the employer or insurance carrier," and the court finds the said conclusions of said deputy commissioner are supported by substantial evidence, as disclosed from the record and evidence adduced before the said deputy commissioner on the several hearings before him.

X.

Th court further finds that the said deputy commissioner in his award of February 15, 1940 ordered that the employer and the insurance carrier furnish the plaintiff treatment by a psychiatrist; that pursuant to such order and award, plaintiff herein submitted himself to Dr. Henry Dixon, a competent

psychiatrist in the City of Portland, Oregon, for treatment on the 22nd day of March, 1940, and that thereafter, pursuant to said order and award, the said plaintiff has continued to take treatments from said Dr. Dixon, and that by reason of such fact the plaintiff has acquiesced in the award and order made by the said deputy commissioner on February 15th, 1940, and has waived his right to question any part of said award and order.

XI.

The court also finds that each and all of the findings of fact set forth in the award and order made by the deputy commissioner on February 15th, 1940, is supported by substantial evidence. [68]

Defendants' requested Conclusions of Law:

I.

That the defendants are entitled to an order and decree affirming the order made by the Deputy Commissioner on July 29th, 1937, and the supplemental order and award made by said Deputy Commissioner on February 15th, 1940.

II.

That the defendants are entitled to an order and decree sustaining their Motion to Dismiss the within suit.

III.

That the plaintiff failed to file his claim for compensation within one year from the date of his in-

jury as required by Section 13-a of the Longshoremen's and Harbor Worker's Compensation Act and that said claim is, therefore, barred, and that neither the defendant employer nor the defendant insurance carrier is estopped from asserting the bar of such statute and that said defendants have not waived the said provisions of said Act.

IV.

That the defendants are entitled to a judgment against the plaintiff for their costs and disbursements incurred herein.

Dated: _____, 1941.

District Judge.

The foregoing defendant's Requested Findings of Fact and Conclusions of Law were lodged with me on March 31st, 1941.

CLAUDE McCOLLOCH

District Judge.

[Endorsed]: Filed July 7, 1941. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [69]

And Afterwards, to wit, on the 8th day of July, 1941, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit:

[70]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, Firemen's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in this action on the 15th day of April, 1941.

CARL C. DONAUGH

United States Attorney for District of Oregon.

Address: United States Court House,
Portland, Oregon.

WILBUR, BECKETT,

HOWELL & OPPENHEIMER

Address: Board of Trade Building,
Portland, Oregon.

Attorneys for Appellants.

[Endorsed]: Filed July 8, 1941. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [71]

And Afterwards, to wit, on the 8th day of July, 1941, there was duly Filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [72]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, that we, Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, Firemen's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, as principals, and Occidental Indemnity Company, as surety, are held and firmly bound unto G. Pletz, plaintiff above named, in the just and full sum of Two Hundred and Fifty (\$250.00) Dollars for the payment of which well and truly to be made, we, and each of us, do hereby bind ourselves, our successors, personal representatives and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of July, 1941.

Whereas, the above named Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, the defendants in the above entitled court and cause, have prosecuted an appeal

to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court of the United States for the District [73] of Oregon, heretofore rendered and entered in the above cause on the 15th day of April, 1941,

Now, Therefore, the condition of this obligation is such that if the said Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, the principals herein, shall prosecute their appeal with effect and answer all costs if the appeal is dismissed or the decree affirmed, or answer such costs as the appellant court may award if the decree is modified, then the said obligation shall be null and void, otherwise to remain in full force and effect.

**OCCIDENTAL INDEMNITY
COMPANY,**

By F. J. BUTCHER
Attorney in Fact,
(F. J. Butcher) Surety.

**CHAS. R. McCORMICK LUM-
BER COMPANY OF DELA-
WARE,**

By H. B. BECKETT
Attorney

**McCORMICK STEAMSHIP
COMPANY**

By H. B. BECKETT

Attorney

WM. A. MARSHALL,

**Deputy Commissioner, 14th Com-
pensation District, U. S. Em-
ployees Compensation Commis-
sion.**

**FIREMAN'S FUND INSUR-
ANCE COMPANY**

By: HENRY L. CARLETON

Principals.

State of California

City and County of San Francisco—ss.

On this 3rd day of July, 1941, before me, Dorothy H. McLennan, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. J. Butcher known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Occidental Indemnity Company and acknowledged to me that he subscribed the name of Occidental Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the

said City and County of San Francisco the day and year in this certificate first above written.

[Seal] **DOROTHY H. McLENNAN**

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 24, 1942.

[Endorsed]: Filed July 8, 1941. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [74]

And afterwards, to wit, on the 8th day of July, 1941, there was duly Filed in said Court, a Statement of Points upon which Appellants intend to Rely, in words and figures as follows, to wit: [75]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON THE APPEAL.

The above named defendants having heretofore filed with the above entitled court their notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, state that on appeal they intend to rely upon the following points:

Point I.

That the District Court erred in overruling defendants' Motions to Dismiss this action for the reason and upon the grounds that it appears from the face of the complaint and the supplemental com-

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plaint of plaintiff on file in this suit and from the record of the proceedings had before Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. E. Employees Compensation Commission, that plaintiff's claim for compensation was not filed within one year after plaintiff's injury, as provided by Sec. 913, Title 33, USCA (Ch. 509, Sec. 13, 44 Stat. 1423), and that objection to such failure was made by the plaintiff's employer and the employer's insurance carrier at the first hearing of the said alleged claim, of which hearing the plaintiff and his attorney had due notice and personally appeared thereat, and that plaintiff at all times was mentally competent, and that said plaintiff at no time has instituted any other suit at law or in admiralty or otherwise against his employer, or any one else, on account of his said injury, and that it is disclosed from the said complaint and the said supplemental complaint and from the record of the said [76] proceedings had before the said Deputy Commissioner that there is substantial evidence that the defendants, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, or any of them, did not waive and are not estopped from asserting the bar of the statute against the said compensation claim of the plaintiff, and that it appears from the record of the proceedings had before said Deputy Commissioner that there is substantial evidence to sustain the orders and awards of the said Deputy

Commissioner, and that, therefore, said orders and awards are conclusive upon the District Court.

Point II.

That the District Court erred in overruling defendants' Motions to Dismiss this suit for the reason and upon the ground set forth in said Motions in that Wm. A. Marshall, the Deputy Commissioner, in his said Order and Award under date of February 15th, 1940, rejected plaintiff's claim for compensation upon the ground that said claim had not been filed with him within one year after plaintiff's injury, as required by Sec. 913, Title 33, USCA (Ch. 509, Sec. 13, 44 Stat. 1432), but that said Deputy Commissioner in his said Order and Award ordered that the defendant employer and the defendant insurance carrier furnish plaintiff treatment by a psychiatrist for the cure of his disability, and that it is disclosed from the record, and the District Court so found, that pursuant to said Order and Award, plaintiff herein submitted himself to Dr. Henry Dixon, a competent psychiatrist in the City of Portland, Oregon, for treatment on the 22nd day of March, 1940, and that the said Dr. Dixon has treated plaintiff ever since said date at least twice a week, and that, therefore, plaintiff has acquiesced in the said Order and Award made by the said Deputy Commissioner on February 15, 1940; that plaintiff cannot accept the portion of said Order and Award that is beneficial to him and reject the other portions of said Order and Award that are not to his benefit. [77]

Point III.

That the District Court erred in making and entering the following Finding of Fact, being Finding of Fact No. VIII:

"I find from the record and evidence adduced before the Deputy Commissioner on the several hearings, that both of these contentions (that the insurance carrier should be estopped from asserting the bar of the statute and that by its dealings with plaintiff it has waived the provisions of the compensation act, requiring a claim to be filed within one year from date of injury, Sec. 913, Title 33, USCA) made by the claimant are well taken. I come to this conclusion from the course this injured man's rights took after his injury;"

for the reason that Wm. A. Marshall, the Deputy Commissioner, in his orders and awards of July 29th, 1937, and February 15th, 1940, found that the plaintiff had not been misled or overreached by the defendant insurance carrier or the defendant employer in connection with the filing of his claim for compensation, and that the findings of said Deputy Commissioner are supported by substantial competent evidence in the record and are therefore conclusive upon the District Court.

Point IV.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XIV:

"that Pletz's condition caused him much pain, nervousness and mental perplexity, and that his injuries have affected his mental processes";

for the reason that there was substantial evidence before the said Deputy Commissioner, as shown from the record herein, that the plaintiff, for months prior to the expiration of the year following his injury, was not suffering from any disabling injury and that at all times he was mentally alert, and, therefore, the findings of the Deputy Commissioner are conclusive.

Point V.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XV: [78]

"It was at one of these conferences that he (plaintiff) stated that he was asking 'if he could not get some kind of an agreement. I did need money but I did not want to let the doctor go.' And he says that the legal representative stated that he would rather make a settlement than pay Pletz compensation. On examination Pletz was pressed on this point and he stated that the settlement was to be a lump sum and a final settlement, and Pletz stated to the legal representative that he did not want to make a final settlement because 'I did need the doctors and we didn't get to no agreement, see' and throughout his examinations it appears that Pletz's insistence to have continued doctor's

care was in Pletz's mind at least, a stumbling block to any settlement, and he says, 'Well, I just let it go along like that.' These conversations took place around the first of the year 1936, at which time Pletz says that he told the attorney in answer to his inquiry, 'Why don't you take compensation?' that he would take it if they would give him a little more. * * * He stated that they were willing to 'settle' but were not willing to give him doctor's care;"

for the reason that said purported Finding of Fact is not a finding of fact at all but is merely a statement of testimony, and for the further reason that said purported Finding of Fact is contrary to the findings of said Wm. A. Marshall, Deputy Commissioner, which findings are supported by substantial evidence in the record, and are, therefore, conclusive upon the District Court.

Point VI.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XVII:

"from that time forward Pletz and a member of the law firm were in continual discussion, about what arrangements could be made for settlement of the claim for the injury by the payment of a lump sum. It appears from the testimony that these discussions were not an occasional matter, but that Pletz frequently

called on the member of the firm who had the matter in hand and conversed with him upon what terms of settlement could be made, and on each occasion he left the office with the impression that it was not without the range of probability that a satisfactory settlement could be reached by further negotiations, and I find from the evidence that the reason the claim was not disposed of before the expiration of the year from the date of the accident when the claim would outlaw, was due to the continuing discussions;”

for the reason that said Finding of Fact is contrary to the evidence and contrary to the findings of the Deputy Commissioner, which findings are supported by substantial evidence in the record and are therefore final and conclusive upon the District Court.

[79]

Point VII.

That the District Court erred in making and entering the following Finding of Fact, being Finding of Fact No. XVIII:

“The Court finds that the dealing between the insurance carrier’s representative and Pletz were such as to mislead Pletz with respect to his right to apply for and receive compensation at any time he desired to apply for it;”

for the reason that said Finding of Fact is contrary to the evidence and contrary to the findings of the Deputy Commissioner, which findings are supported

by substantial evidence in the record, and are, therefore, binding upon the District Court.

Point VIII.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XIX:

"it would appear to the court that the spirit of the Act would require the Deputy Commissioner to make an investigation why Pletz was not accepting compensation;"

for the reason that said Finding of Fact is contrary to the evidence and contrary to the law and is also contrary to the findings of the Deputy Commissioner, which findings are supported by substantial competent evidence in the record and are, therefore, conclusive upon the District Court.

Point IX.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XXI:

"the letter (from the attorney for the insurance carrier under date of November 6, 1936) undoubtedly led the Deputy Commissioner to believe that compensation was being paid, and the only question for his consideration was the extent of the disability of the claimant. I deduce from the testimony of Mr. Marshall, the Deputy Commissioner, that had he known that the time to file Pletz's claim would expire on

the 12th for failure to file a claim, or that the payment of compensation would have been refused for the failure to file a claim by claimant; he, as administrator of the Act, would have advised Pletz of the necessity of protecting his rights by filing a claim prior to the 12th of November, 1936;" [80]

for the reason that said Finding of Fact is contrary to the evidence and is contrary to the findings of said Deputy Commissioner, which findings are supported by substantial evidence in the record, and cannot, therefore, be disturbed by the District Court.

Point X.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XXII: .

"I find that he (Pletz) was confused and that his confusion was increased by numerous discussions with a member of the law firm of the insurance carrier in relation to his rights;" for the reason that said Finding of Fact is contrary to the evidence introduced at the various hearings had before the Deputy Commissioner, in that the evidence discloses that the representative of the defendant insurance carrier endeavored to induce the plaintiff to accept the compensation he was entitled to under the compensation act, but that plaintiff refused to accept same, claiming the amount offered was too small; that the evidence further shows that

notwithstanding the payroll records were open to plaintiff's inspection, and he was so informed, he failed at any time to submit figures showing that the amount offered by the defendant insurance carrier was incorrect. That the evidence also discloses that if there was any confusion in the mind of plaintiff, it was due to the advice of his own lawyers and not to anything said by the representatives of the insurance carrier. That the evidence further discloses that the plaintiff gave the said representatives to understand that he was represented by other lawyers and knew what he was doing. Further, said Finding of Fact is contrary to the findings of the Deputy Commissioner, which findings are supported by substantial evidence and are conclusive on the District Court.

Point XI.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding [81] of Fact No. XXII:

"He (the attorney for the insurance carrier) testified that in September, 1936, the insurance carrier requested that no further medical attention be given Pletz on the defendant insurance carrier's account, and he so notified Dr. Belknap, who had charge of the medical care;"

for the reason that said Finding of Fact is contrary to the evidence introduced at the hearings before the Deputy Commissioner, as disclosed from the record herein, and is contrary to the findings of

said Deputy Commissioner, which findings are supported by substantial competent evidence and are binding on the District Court.

Point XII.

That the District Court erred in making and entering the following Finding of Fact, being a portion of the Court's Finding of Fact No. XXIII:

"It is uncontradicted that Pletz was given no notice that these medical services were being withdrawn on the insurance carrier's account, and that the medical services extended to him thereafter were on his own account, or on other account;"

for the reason that said Finding of Fact is contrary to the evidence introduced at the various hearings had before the said Deputy Commissioner, as disclosed from the record herein, and is contrary to the findings of said Deputy Commissioner, which findings are supported by substantial competent evidence, and are, therefore, conclusive upon the District Court.

Point XIII.

That the District Court erred in making and entering the following Finding of Fact, being the Court's Finding of Fact No. XXV:

"I find that the discussions were conducive to creating a belief in the mind of the plaintiff that he could, by continued negotiations, eventually effect a settlement by cash payment. This

directly induced the man not to perfect his claim;”

for the reason that said Finding of Fact is contrary to the evidence introduced at the various hearings had before the Deputy Commissioner, as disclosed from the record herein, and is contrary to the findings of the said Deputy Commissioner, which findings are supported by substantial evidence, and are, therefore, binding [82] upon the District Court.

Point XIV.

That the District Court erred in refusing to make and enter defendants' proposed Finding of Fact No. VII, reading as follows:

“The court finds that at all times, with possible exception of a few days immediately following his first operation, the plaintiff had full possession of his faculties and knew what he was doing and was capable of transacting his business affairs and was fully aware of the character and purpose of the compensation that was offered him by the insurance carrier, and that the testimony of the plaintiff at the various hearings before the Deputy Commissioner, as shown from the transcript thereof, discloses that the plaintiff is mentally alert, and the court further finds that the deputy commissioner, before whom plaintiff's claim was heard, found that ‘I can find nothing objectively wrong with this man,’ and that he could ‘see no indication

for medical treatment,' except that said deputy commissioner found that the plaintiff 'seems sincere in the belief that he is suffering from an ill' and that said deputy commissioner found that possibly treatment by a psychiatrist might be of some benefit to said plaintiff."

Point XV.

That the District Court erred in refusing to add the proposed Finding of Fact of defendants as a part of the Court's Finding of Fact V(b):

"and the Court finds that the conclusions of said Deputy Commissioner are supported by substantial evidence, as disclosed from the record and evidence adduced before the said Deputy Commissioner on the several hearings before him."

Point XVI.

That the District Court erred in refusing to add the following proposed Finding of Fact of defendants as a part of the Court's Finding of Fact V(c):

"and that by reason of such fact the plaintiff has acquiesced in the award and order made by the said Deputy Commissioner on February 15th, 1940, and has waived his right to question any part of said award and order."

Point XVII.

That the District Court erred in refusing to make the following Finding of Fact, being defendant's proposed Finding of Fact No. XI. [83]

"The court also finds that each and all of the findings of fact set forth in the award and order made by the Deputy Commissioner on February 15th, 1940, is supported by substantial evidence."

Point XVIII.

That the District Court erred in not making and entering the following conclusions of law requested by the defendants:

1. That the defendants are entitled to an order and decree affirming the order made by the Deputy Commissioner on July 29th, 1937, and the supplemental order and award made by said Deputy Commissioner on February 15th, 1940.
2. That the defendants are entitled to an order and decree sustaining their Motions to Dismiss the within suit.
3. That the plaintiff failed to file his claim for compensation within one year from the date of his injury as required by Section 13-a of the Longshoremen's and Harbor Workers' Compensation Act and that said claim is, therefore, barred, and that neither the defendant employer nor the defendant insurance carrier is estopped from asserting the bar of such statute and that said defendants have not waived the said provisions of said Act.
4. That the defendants are entitled to a judgment against the plaintiff for their costs and disbursements incurred herein.

Point XIX.

That the Conclusions of Law and final decree made and entered by the District Court herein are erroneous upon the ultimate facts proven by the record in this cause and are also erroneous in that there is substantial competent evidence in the record herein to support the conclusions reached by the said Deputy Commissioner in his orders and awards of July 29, 1937, and February 15, 1940, and that under such circumstances the District Court had no authority to conclude and decree that said orders and awards be set aside.

CARL C. DONAUGH,

United States Attorney for the
District of Oregon.

**WILBUR, BECKETT, HOWELL
& OPPENHEIMER**

Attorneys for Defendants and
Appellants.

[Endorsed]: Filed July 8, 1941. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [84]

And Afterwards, to wit, on the 8th day of July, 1941, there was duly filed in said Court, Designation of Record on Appeal, in words and figures as follows, to wit: [85]

[Title of District Court and Cause.]

DESIGNATION BY DEFENDANTS OF THE PARTS OF THE RECORD AND PROCEEDINGS TO BE INCLUDED IN THE RECORD ON APPEAL.

The above defendants hereby designate as the portions of the record, proceedings and evidence to be contained in the record on appeal the following:

1. Complaint.
2. Order referring cause back to the Deputy Commissioner for purpose of making specific findings.
3. Supplemental Complaint.
4. Motion of defendants, Fireman's Fund Insurance Company, Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company, to dismiss suit.
5. Motion of defendant, Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, to dismiss suit.
6. Order of Wm. A. Marshall, Deputy Commissioner, under date of July 29th, 1937, rejecting claim for Compensation.

7. Order and award of Wm. A. Marshall, Deputy Commissioner, made and entered on the 15th day of February, 1940.

8. Transcript of all the proceedings, including all of the testimony, at the hearing before Wm. A. Marshall, Deputy Commissioner, on July 23rd, 1937, which proceedings were stenographically reported.

9. Transcript of all the proceedings, including all of the testimony, at the hearing before Wm. A. Marshall, Deputy Commissioner, on March 17th, 1939, which proceedings were stenographically reported.

10. Transcript of all the proceedings, including all of the testimony, at the hearing before Wm. A. Marshall, Deputy [86] Commissioner, on May 13th, 1939, which proceedings were stenographically reported.

11. Transcript of all the proceedings, including all of the testimony, at the hearing before Wm. A. Marshall, Deputy Commissioner, on June 16th, 1939, which proceedings were stenographically reported.

12. Claimant's Exhibit 1, introduced in evidence at hearing before Wm. A. Marshall, Deputy Commissioner, on July 23rd, 1937.

13. Claimant's Exhibit 2, being the original file of Wm. A. Marshall, Deputy Commissioner, dealing with plaintiff's compensation claim, and consisting of twenty-five documents which are set forth on pages 26 to 50, both inclusive, of

the transcript of the hearing had before said Deputy Commissioner on July 23rd, 1937. There may be omitted such of said documents as are set forth in plaintiff's complaint.

14. Opinion of Judge McColloch on October 24th, 1940.

15. Defendants' Requested Findings of Fact and Conclusions of Law.

16. The portions of the Defendants' Exceptions to the Findings of Fact and Conclusions of Law of the Court as are referred to in the Statement by Appellants of the Points upon which they intend to rely upon Appeal.

17. Findings of Fact and Conclusions of Law.

18. Decree.

19. This Designation.

20. Statement by Appellants of the Points upon which they intend to rely upon appeal.

21. Notice of Appeal, with date of filing.

22. Bond on Appeal.

23. Clerk's Certificate.

Dated this 8th day of July, 1941.

CARL C. DONAUGH,

United States Attorney for the District of Oregon.

WILBUR, BECKETT,

HOWELL & OPPENHEIMER

Attorneys for Defendants.

[Endorsed]: Filed July 8, 1941. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [87]

And Afterwards, to wit, on the 29th day of July, 1941, there was duly filed in said Court, an Amendment to Designation of Record on Appeal, in words and figures as follows, to wit: [88]

[Title of District Court and Cause.]

AMENDMENT TO DESIGNATION BY DEFENDANTS OF THE PARTS OF THE RECORD AND PROCEEDINGS TO BE INCLUDED IN THE RECORD ON APPEAL.

Come now the above defendants and hereby amend the Designation of the parts of the Record and Proceedings to be included in the record on appeal in the above cause, heretofore filed by said defendants, in the following particulars:

That subdivision number 6 of said Designation shall be amended to read as follows:

6. Order of Wm. A. Marshall, Deputy Commissioner, under date of July 29th, 1937, rejecting claim for Compensation.

That the foregoing Order is set forth Verbatim in Paragraph XI of plaintiff's complaint, and, therefore, it will be unnecessary to include said order again in the Transcript of the Record.

That subdivision number 12 of said Designation shall be amended to read as follows:

12. Claimant's Exhibit 1, introduced in evidence at hearing before Wm. A. Marshall, Deputy Commissioner, on July 23rd, 1937.

That said Claimant's Exhibit 1 is set forth

verbatim on page 23 of the transcript of the proceedings before said Deputy Commissioner on July 23rd, 1937, and, therefore, it will be unnecessary to include said Exhibit 1 again in the Transcript of the Record.

That subdivision number 13 of said Designation shall be amended to read as follows:

13. Claimant's Exhibit 2, being the original file of Wm. A. Marshall, Deputy Commissioner, dealing with plaintiff's compensation claim, and consisting of twenty-five documents which are set forth on pages 26 to 50, both inclu- [89] sive, of the transcript of the hearing had before said Deputy Commissioner on July 23rd, 1937.

That said Claimant's Exhibit 2, consisting of twenty-five documents, is set forth verbatim on pages 26 to 50, both inclusive, of the transcript of the hearing had before said Deputy Commissioner on July 23rd, 1937, and, therefore, it will be unnecessary to include said Exhibit 2 again in the transcript of the Record.

That this Amendment shall be included in the Record on Appeal in this cause; that except as herein amended the Designation of the parts of the Record and Proceedings to be included in the Record on Appeal heretofore filed by the defendants shall remain unchanged.

CARL C. DONAUGH,
WILBUR, BECKETT, HOWELL
& OPPENHEIMER,

Attorneys for Defendants.

Wm. A. Marshall

I hereby consent to the making and filing of the foregoing amendment.

WM. P. LORD,

Attorney for Plaintiff.

Due service of the foregoing Amendment to Designation, by receipt of copy, accepted this 29th day of July, 1941.

WM. P. LORD,

Attorney for Plaintiff.

[Endorsed]: Filed July 29, 1941. G. H. Marsh,
Clerk. [90]

'And Afterwards, to wit, on Friday, the 8th day of August, 1941, the same being the 27th judicial day of the regular July, 1941, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [91]

[Title of District Court and Cause:]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL, ETC.

For satisfactory reasons appearing to the Court, the time for filing the record on appeal and docketing the above action in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is hereby extended to and including the 15th day of September, 1941.

Dated this 8th day of August, 1941.

CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed August 8, 1941. G. H. Marsh,
Clerk. By E. A. Landis, Deputy. [92]

United States of America, District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 92 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered E-9707, in which G. Pletz is plaintiff and appellee, and Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission; Fireman's Fund Insurance Company, a corporation; Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, are defendants and appellants; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the

same appear of record and on file at my office and in my custody.

I further certify that I am enclosing with said transcript, the duplicate copies of transcript of testimony filed in said cause in four volumes.

I further certify that the cost of comparing and certifying the within transcript is \$15.70 and that the same has been paid by said appellants, Fireman's Fund Insurance Company, Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 12th day of August, 1941.

[Seal]

G. H. MARSH,

Clerk.

[93]

United States Employees' Compensation Commission,
Fourteenth Compensation District.

Case No. 431-6

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers' Com-
pensation Act.

G. Pletz,

Claimant,

against

SS "West Planter" &/or Chas. R. McCormick Lum-
ber Co. of Delaware, &/or McCormick SS. Com-
pany,

Employer,

Fireman's Fund Insurance Comapny,
Insurance Carrier.

**TRANSCRIPT OF TESTIMONY AT
HEARING.**

Pursuant to notice, this matter was heard before
Wm. A. Marshall, Deputy Commissioner, United
States Employees' Compensation Commission, at
Portland, Oregon, on the 17th day of March, 1939.

Appearances:

WM. P. LORD,

For the Claimant.

H. B. BECKETT,

For the Employer and Insurance Carrier. [94]

Mr. Lord: Now, Mr. Marshall, in this case of

Gus Pletz, which is back here pursuant to the order of the United States Court under date of February 23d, 1939, for special findings, I presume I have the affirmative of this issue—that is, Mr. Pletz does—and among other things I desire to offer additional testimony. I want to call a Dr. Firth and a Dr. Urling Coe, and possibly Mr. Pletz, for a little further examination. By Dr. Firth I propose to show that Mr. Pickett, acting for the Fireman's Fund, during certain times both prior and subsequent to one year from the date of the accident, requested the performance of services and made certain statements relating to the claim to Dr. Firth. Now, I am not pinning myself down to times, nor what was said, by this statement, because I don't know, I have never more than casually discussed matters with Dr. Firth, and those over the phone, and I don't know him. I caused a subpoena to be issued to him, because I don't want to be bound by anything I say here as to what I think Dr. Firth may testify to.

The Commissioner: Now, I don't want to interrupt you, but I do want to have this thing clarified. Mr. Pletz made a claim, a hearing was held, and an order filed. It was appealed to the courts and now this matter is referred back by the Court to the Deputy Commissioner. While the matter was still in court, Mrs. Pletz, as the guardian of the claimant, filed an application and we held one hearing in connection with that on July 22, 1938. Now, the question in my mind is this: Can these matters be combined, the claim of the claimant him- [95]

self, and the separate claim of the wife as guardian? Isn't that where the thing is confused somewhat in court?

Mr. Lord: No, sir. It is my understanding—my understanding of the matter is that the guardian's claim is entirely a separate and distinct claim from the claim that is under consideration now. That is my understanding.

Mr. Beckett: Yes, that is my understanding also.

Mr. Lord: That this is an appeal from the order that you made rejecting the claim on account of failure to file the claim within the time limited by the Act, and it does not regard the guardian's claim, nor was that matter ever discussed before the United States Court. Is that correct?

Mr. Beckett: It was never discussed.

The Commissioner: I am not informed as to that, that is the reason I made the statement.

Mr. Beckett: There was no reference made before Judge McColloch, and as far as I know he doesn't know, as far as I know he doesn't know of any claim by the guardian.

Mr. Lord: Let me state, I have that matter, as might be said in these days of wars and threats of wars, as my reserve.

The Commissioner: Then this additional testimony that you are prepared to present goes to the question of whether the claimant was himself in any way—I forget the exact term, it will come to me in a moment—

Mr. Lord: Estopped, is the term we have been using.

The Commissioner: Yes, that is the purpose of the testimony? [96]

Mr. Lord: Yes, partly; and I hadn't finished with what I started to say. And the testimony of Dr. Urling Coe is designed to show that there is a displacement of some of the upper vertebrae that causes this continuing disability, and that if we had this medical treatment which this law provides for, that there might be a fairly prompt cure effected. Now, I have already took the responsibility of advising one of the attorneys for the Fireman's Fund of this condition, and the report of Dr. Urling Coe, and I think the matter has been pretty thoroughly discussed among the doctors for the Fireman's Fund.

The Commissioner: Now, we ought to know just what we are here for.

Mr. Lord: Well, that is what we are here for.

The Commissioner: Well, I am trying to state my understanding of your present issue here, that there are two points you have in mind to be established by this additional testimony, one that the carrier should be estopped from raising the question of the year's limitation for certain reasons; and secondly, that irrespective of the merits of the discussion on that, that under the Act that the man is entitled to medical treatment irrespective of compensation.

Mr. Lord: Yes, sir.

The Commissioner: Am I stating that correctly?

Mr. Lord: Yes, sir, correct. If he has lost his right to compensation, he hasn't lost his right to medical attention, and that the Act guarantees him that anyhow. If a man wants to throw his money in the river, that is one thing, [97] but on the other hand he might want the medical attention.

The Commissioner: Have you any different thought, Mr. Beckett?

Mr. Beckett: I would certainly think that when a man's right elapsed—I mean if by the end of the year he had not filed his claim, that both the right to compensation and medical care would be terminated.

The Commissioner: There could easily be a serious question as to that. The Act provides that in the event of injury to an employe the employer shall provide either directly or through the insurance carrier the compensation provided by the Act. And it also provides that the employer shall provide medical and other care as may be required by the injured. The section I refer to is Section 7-A, page 3, which reads: "The employer shall furnish such medical, surgical, and other attention or treatment, nurses and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require."

Mr. Beckett: In order to get Mr. Lord's position—I mean, if the man is entitled to perpetual medical care, regardless of filing a claim—one of the grounds you set up in your bill of complaint you filed in court, the reason we were estopped from raising the

statute of limitations was that some medical attention or medical services had been rendered.

Mr. Lord: Yes, after the expiration of one year.

Mr. Beckett: Yes, after the expiration of one year.

Mr. Lord: And during the period of one year. And [98] then I think independent of any other question in this case, I think that the man is entitled to medical attention—if I may have your law that Mr. Marshall handed you there—as I understand it, Mr. Marshall, the word “compensation”, as defined in this Act on page 2, doesn’t of necessity include medical services and hospitalization. That those two provisions could be determined as being independent.

The Commissioner: That is subdivision 12 on page 2.

Mr. Lord: Yes, subdivision 12 on page 2. If you desire to look at that, Mr. Beckett. My understanding is that the ordinary definition of “compensation” would include both medical attention and a money award, but apparently this Act defines compensation just as money. The sum of money that is payable according to the deductions that are made by the method of computation, and that the other, the medical attention and hospital attention is entirely distinct, and that a man may have that where he wouldn’t have compensation. I would take it, for instance, that suppose a man would receive an injury on the job that wouldn’t disable him from performing work, yet he might require medical atten-

tion, like the dressing of a wound. So that is our position, as far as our contention as to proper medical attention and hospitalization is concerned.

The Commissioner: Well, we can go ahead on your testimony.

Mr. Lord: I have Dr. Urling Coe here.

DR. URLING C. COE,

called as a witness on behalf of the claimant, having been first duly sworn by the Deputy Commissioner, testified as follows: [99]

Direct Examination

Questions by Mr. Lord:

Q. Now, Dr. Coe, you are licensed to practice medicine in the State of Oregon, are you not?

A. Yes, sir.

Q. And how many years have you been licensed to practice here? A. Thirty-four years.

Q. And will you explain to the Deputy Commissioner the extent of your practice in connection with industrial surgery or traumatic injuries?

A. Well, I have—

Q. (Interrupting) Not only your practice, but your experience in particular with the whole subject?

A. Well, I have had quite a little industrial experience in railroad work, sawmills, logging work and all that sort of thing. I maintained a hospital up at Bend for a time and took care of all the mill

(Testimony of Dr. Urling C. Coe.)

employees of Shevlin-Hixon and Brooks-Scanlon Company in the mill and in the woods.

Q. And what experience have you had in connection with surgical work with railroads?

A. I was surgeon for the Oregon Trunk Railroad at Bend for about seven years.

Q. Did you ever have any experience outside of Oregon in industrial surgery?

A. As an assistant to the chief surgeon of the Big Four Railroad I had some experience. I have never practiced in any other state aside from Oregon.

Q. Now, Doctor, in the diagnosis of cases, are you familiar [100] with the use of X-rays?

A. Yes, sir.

Q. And you do use X-rays, do you? A. Yes.

Q. And what other means in this particular case did you use to arrive at a proper conclusion of his condition?

A. General physical examination.

The Commissioner: When, when did you have the examination?

A. I have forgotten—(the witness consults the X-rays)—December, from the 4th to about the 12th.

The Commissioner: Last year?

A. 1938, yes. Most of these X-rays were taken on the 9th of December.

Q. What was he complaining of at the time?

A. Pain of a general character all up and down his left side, the left side of his body. The right side

(Testimony of Dr. Urling C. Coe.)

of his body. Pain in his head, in his neck, in his body and right hip.

Q. Doctor, was that examination made at my request? A. Yes, sir.

Q. And for the purpose of determining whether or not there was any present disability, was it not?

A. Yes, sir.

Q. And whether anything could be done for it?

A. Yes, sir.

Q. And did you come to any conclusion from the examination that you made about his present condition, as to whether or not [101] he had any continuing disability?

A. Yes. The X-rays showed definitely that the fourth lumbar vertebra, and the fourth and fifth cervical vertebra had been injured.

Q. Now, I know the Deputy Commissioner knows exactly where those vertebrae are located, but would you mind stating it for the purpose of the record, where the disability is?

A. The cervical vertebrae are in the neck. They begin, No. 1 at the head, and they are numbered downward. They are seven cervical vertebrae all together. And the lumbar vertebrae are in the small of the back between the ribs and the hip.

Q. Now, Doctor, did you consult with anybody else about the conclusions you had come to for verification or for corroboration? A. Yes, sir.

Q. With whom did you consult?

(Testimony of Dr. Urling C. Coe.)

A. Dr. Roy A. Payne, who specializes in X-ray diagnosis, and Dr. Lucas, who is an orthopedic surgeon in partnership with Dr. Dillehunt.

Q. And will you state whether or not their conclusions were the same as your own?

A. Yes. The X-rays fit in perfectly with the findings of the physical examination.

Q. Now, to become more specific about his present condition, would you mind pointing out on the X-rays where there is evidence of physical disability?

A. Yes (indicating by an X-ray film). Now, these are the [102] cervical vertebrae, and they begin up here, 1, 2, 3, 4, 5. These two (indicating). Now, you see this picture is taken long after the injury, but there is evidence there that that vertebra, the body of it, has been crushed. And looking at it from the other side, you will see that it is just out of alignment a little bit, pushed to one side.

Mr. Lord: May I ask the reporter to give us an exhibit number on that X-ray.

(Thereupon the X-ray film referred to is marked "Claimant's Exhibit 1.")

The Witness: Now, here is another one, another X-ray. Now, if you will notice the alignment there, this is pushed to one side, here is the edge of this vertebra, there is the edge of that one (indicating), and this has been crushed, that part of it there is narrower than the other side. These two measure-

ments from here to here (indicating), and from there to there (indicating), should be the same. In other words, the vertebra is the same thickness all the way through, but if you measure it carefully with a good light you see that this side is much shorter than this one.

The Commissioner: Which cervical is that, now?

A. The fifth cervical vertebra.

Mr. Lord: Now, we will have that marked as Claimant's Exhibit No. 2.

(The film referred to is marked "Claimant's Exhibit No. 2".)

The Witness: Now, these are the lumbar vertebrae, this is the fourth vertebra. This side of this vertebra, the body [103] of it, has been crushed. It isn't as wide from there to there (indicating) as it is from here to here (indicating) on this side.

The Commissioner: That is what, the fourth?

A. Yes, that is the fourth, the fourth lumbar vertebra.

The Commissioner: Outline the fifth for me.

A. That rests right on the sacrum, the fifth.

The Commissioner: Yes.

Mr. Lord: Now, we will ask to have that film marked as "Claimant's Exhibit No. 3".

(Thereupon the X-ray film referred to is marked "Claimant's Exhibit No. 3".)

The Witness: We had to take a lot of different pictures to get anything definite, it was a hard case to get anything definite.

(Testimony of Dr. Urling C. Coe.)

Q. I notice you have a number of X-rays there.

A. Yes.

Q. Are those other X-rays you have there negative?

A. Yes, they are negative. There are some of them that didn't show any abnormality at all. If it happened to be a little too much to one side, or not at the right angle, it doesn't show.

Q. Is there anything else that you have in the X-rays you have in your hand that you desire to point out to the Deputy Commissioner as showing pathology in this particular case?

A. I don't think of anything right now.

Q. Now, Doctor, did you discuss this matter at all with [104] Dr. Leland Belknap?

A. No, I haven't.

Q. You never have discussed it with him?

A. No, sir.

Q. Did you undertake to see the X-rays that had been taken subsequent to November 12th, 1935, and up to say May, 1938?

A. No, I haven't seen any of them. I didn't know this case was coming up so soon, or I would have seen them before I came up here.

Q. The reason I asked about that, it has been suggested that you confer with Dr. Belknap about these X-rays and what was shown by them. Doctor, are you quite positive in your belief that there is pathology shown in the X-rays which are now "Claimant's Exhibits 1, 2, and 3"?

(Testimony of Dr. Urling C. Coe.)

A. Yes, sir.

Q. Now, coming down to the question of present disability, do you find any present disability in Mr. Pletz?

A. Yes.

Q. What is the nature of the disability that you find?

A. He shows considerably more than a little irritation of the spinal nerves in the cervical region in the neck. I would say, evidence of irritation, would put it better—that cause the muscles in these regions to be in a state of chronic tension.

The Commissioner: Spasm?

The Witness: And cause considerable pain, something like you would have in a muscle that was having a cramp.

Q. Now, how about the condition in the lower back just above [105] the sacrum?

A. The same condition practically both in the neck and in the lower part of the body and the hip.

Q. You think these conditions are such that would cause him continued pain?

A. Yes.

Q. And do you think from what you know of the history of the case that this man is able to resume a gainful occupation at this time?

A. No, no, he is not.

Q. Would his condition be improved by any medical work and hospitalization?

A. I think it will.

(Testimony of Dr. Urling C. Coe.)

Q. And what would be your suggestion in the way of medical treatment?

A. I think it is possible by putting some tension on the muscles of the neck, stretching on the muscles of the neck, to tire them out so that they will relax and get the vertebrae there in better position, better alignment or at least stop some of the irritation on those cervical nerves from the present pressure and contraction.

Q. How long a course of treatment would that ordinarily require, Doctor?

A. I don't know; several months.

Q. No definite date could be fixed for a condition—

A. No.

Q. A stationary physical condition in respect to improvement [106] or—

A. There should be some improvement in a short time, a week or ten days. It should help his pain some, but how long it will take, he might have to be in a cast for two or three months. And you don't need to put this in the record, but I was just thinking in behalf of Mr. Pletz, his treatment, it might be well to refer him to an orthopedic surgeon, somebody like Lucas or Dillehunt, for his treatment. They have had more experience in that line of work than I have.

Q. Did you discuss the matter at all with respect to treatment with Dr. Dillehunt or Dr. Lucas?

A. No, no, I haven't.

Q. It is just a question of diagnosis?

(Testimony of Dr. Urling C. Coe.)

A. Yes.

The Commissioner: But you did say, did you not, that some of those gentlemen agreed with your conclusions as to the findings? A. Yes.

Mr. Lord: Dr. Lucas, as I recall it.

The Commissioner: He mentioned the name of Dillehunt.

Mr. Lord: That Lucas was a partner of Dillehunt.

The Commissioner: Oh, yes, that was what he said, yes.

Q. Would you yourself be willing to undertake this treatment?

A. Yes, yes, I just mentioned that, as that is their specialty, and I just do general work, general surgery.

Mr. Lord: I think that is all. [107]

Cross Examination

Questions by Mr. Beckett:

Q. Doctor, how long have you known Mr. Pletz?

A. Since he came to the office in December.

Q. That was December last?

A. December, 1938, yes.

Q. I mean, you hadn't ever known him?

A. No.

Q. Or given him any treatment of any sort?

A. No.

Q. Where is your office, Doctor?

A. In the Studio Building.

(Testimony of Dr. Urling C. Coe.)

Q. Studio Building? A. Yes, 509.

Q. You said something about one of those exhibits, I have forgotten, the larger one there, that it showed some condition of the fourth lumbar vertebra, I didn't get just what that was.

The Commissioner: He thought it was fractured, wasn't it?

The Witness: The body of the vertebra has been injured, crushed. I don't mean completely crushed, partly crushed.

Q. When did you confer with Dr. Lucas on the case?

A. I didn't talk directly to Dr. Lucas. Dr. Payne took the X-rays up there to get Dr. Lucas' opinion, and Dr. Payne gave me Dr. Lucas' diagnosis on it.

Q. You never talked with Dr. Lucas yourself?

A. Personally, no.

Q. Now, give me the name of Dr. Payne.

A. Dr. Roy A. Payne, he is in the same office with me. [108]

Q. Dr. Roy A. Payne?

A. Yes. Dr. Roy A. Payne, and he specializes in X-ray diagnosis and internal medicine. Diagnosis is his specialty.

Q. Did Dr. Lucas give Dr. Payne any written report, do you know?

A. No, there has been no written report, just verbal.

Q. Just verbal?

(Testimony of Dr. Urling C. Coe.)

A. Yes. I might say here, for your information, the first time he was X-rayed by Dr. Belknap his neck was not X-rayed. He was struck in the side and all the X-rays were taken below the level of the shoulders, although he complained of his neck. That injury was evidently caused from a sudden wrenching of his head, being thrown to one side by the blow, and the neck was never examined at the first examination.

Mr. Beckett: I think that is all.

Mr. Lord: That is all, Doctor, and thank you very much.

The Witness: Do you want to keep these X-rays here?

Mr. Lord: These X-rays here we desire to offer in evidence, 1, 2 and 3, and the other X-rays we will offer as a group in evidence.

The Commissioner: I will count them, there are nine of them in that group.

(Witness excused.)

DR. PAUL B. FIRTH,

called as a witness on behalf of the claimant, having been first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination

Questions by Mr. Lord: [109]

Q. Doctor, what is your first name?

A. Paul B.

(Testimony of Dr. Paul B. Firth.)

Q. Where is your office?

A. 403 Orpheum Theatre Building.

Q. Now, Doctor, what is your profession?

A. Chiropractor.

Q. And how long have you been engaged in that profession here in Portland?

A. Twelve years in Portland.

Q. And do you carry a license in the State of Oregon? A. Yes, sir.

Q. And did you at any time have a discussion with Mr. David C. Pickett? A. Yes, sir.

Q. Do you know Mr. Pickett? A. Yes, sir.

Q. And did you ever have a discussion with him with reference to a man by the name of Gus Pletz?

A. Yes, sir.

Q. And will you state the date of that first conversation with Mr. Pickett? A. June 5th.

Q. What year? A. 1936.

Q. And you made a memorandum at the time of the conversation with Mr. Pickett?

A. Yes, I made a memorandum at the time. I have some later [110] references on there, but the conversation was a telephone conversation with Mr. Pickett on June 5th.

Q. Did he give you a history that Mr. Pletz had been injured on November 12th, 1935?

A. No, sir.

Q. What was the nature of the conversation?

A. The conversation was as to an okeh that he was making as to services to be rendered on Mr.

(Testimony of Dr. Paul B. Firth.)

Gus Pletz' case, after I had made an examination. The examination was made on June 2d, 1936, and to verify Mr. Pletz' statement in my office that Mr. Pickett had given his recommendation that he come to me for services, I called Mr. Pickett in the presence of Mr. Pletz at my desk, sitting in front of my desk, at which time Mr. Pickett okehed services in behalf of Mr. Pletz.

Q. And did you render services then to Mr. Pletz?

A. On June 5th I started services.

Q. And how long did your services continue?

A. Until July 24th, 1936.

Q. And during that time did you ever have any conversation with Mr. Pickett, during the interim?

A. Yes.

Q. About Gus Pletz, and if so, state the conversation you had with him.

A. At the expiration of twelve chiropractic adjustments I called Mr. Pickett, advising him that I thought it was necessary that we continue for a short time, and asked him if he would okeh twelve more treatments, which he did.

Q. At that time was anything said about Pletz' case, and [111] how it was going to be paid for in respect to any treatments?

A. I will have to answer that this way: He okehed the services and stated that the bill would be paid to me for the services rendered. And do you

(Testimony of Dr. Paul B. Firth.)

want the further notations now pertaining to the case?

Q. Yes, I do.

A. Then on August 15th, 1936, he advised me that the insurance company had not made a settlement with Mr. Pletz, but not to worry, my claim would be paid. And I have further notations if you care for them.

Q. Yes, I do care for those further notations that you have, as far as anything Mr. Pickett may have said about this case.

A. Then again on November 30th, 1936, I called Mr. Pickett naturally, asking him when he was going to pay this claim, several months had passed.

Mr. Beckett: Pay your bill?

A. Yes, pay my bill. I asked him when it was to be paid, and he at that time asked me for an itemized statement, which I sent him. That was November 30th.

Q. Did he make any statement in any way that bore upon the claim that Mr. Pletz had, as to the status of the claim, or what the outcome was in connection with it in any way?

A. All these months Mr. Pickett kept telling me that the case hadn't been settled, and that as soon as the case was settled that he would pay the obligation to me. Then on May 15th, 1937, I again called Mr. Pickett, at which time he stated [112] he was unable to pay the claim.

Q. Did he give any reason for it?

(Testimony of Dr. Paul B. Firth.)

A. Stating that he didn't feel that the services had been satisfactory, and I can't just recall all of the other conversation, but anyway to the effect that they were unable to pay the claim. I think you know, maybe you don't know, but on March 2d this year, 1939, I sued Mr. Pickett for this fifty-dollar fee, at which time we lost the case in Judge Olson's court.

Q. You didn't sue the insurance company?

A. My attorney sued Mr. Pickett, not the insurance company.

Mr. Beckett: You sued Mr. Pickett when?

A. March 2, 1939.

Q. As I understand it, you just sued Mr. Pickett straight?

A. Mr. Lord, may I say that my attorney felt that Mr. Pickett should be good for his word. On all these conversations up until something happened that I don't know, have any knowledge of, everything was all fine with promises, but promises didn't meet the obligation, and I felt I had rendered my services and was entitled to my fee, but something happened on May 15th, 1937, that I have no knowledge of, but at which time he felt that he couldn't pay the claim.

Mr. Lord: Well, I don't believe in making issues with attorneys on their word, Doctor, I think that the principal in the matter should be sued, and never the attorney.

The Witness: It cost me twenty dollars to find out, anyway. [113]

(Testimony of Dr. Paul B. Firth.)

Q. Now, during all this period of time that you had Mr. Pletz under treatment, that is, up until November 12th, 1936,——

A. (Interrupting) July, Mr. Lord.

Q. No, I say up to November, you treated him during the period there that you claim could still be considered an open claim, then after November 12th, 1936, did Mr. Pickett at any time tell you he wasn't going to pay you for your services for the reason that Mr. Pletz had let his claim outlaw?

A. No, Mr. Pickett never had told me that, but Mr. Pletz did. Mr. Pletz has been very, very fine in coming in and feeling that I was entitled to my pay, and he called at my office and told me those particulars, that there was some question as to settlement, or something. I am not acquainted with those details and I really can't tell you.

Q. When was that?

A. I have seen Mr. Pletz, he has come to the office and asked me if I ever got my money; he did that on a number of occasions.

Q. When was the first time he did that?

A. He asked me right after that, he asked me in August, and also November, 1936, August and November of 1936, both.

Q. Did he express then any doubt as to when he would get his own compensation?

A. He told me that Mr. Pickett had made him a lot of promises, but that he had never got anything.

(Testimony of Dr. Paul B. Firth.)

Mr. Beckett: Just a minute, I object to this; it is going entirely too far afield, it is not proper here.

[114]

Mr. Lord: It is in an admiralty proceeding.

The Commissioner: The claimant can testify to what he said. You can get at it that way if you want to.

Mr. Lord: Well, Doctor, I am very much obliged to you, as far as we are concerned.

Cross Examination,

Questions by Mr. Beckett:

Q. Doctor, as I understand it, the two treatments that you rendered were from June 5th, 1936, to what date? A. July 24th, 1936.

Q. To July 24th, 1936? A. Yes, sir.

Q. And after July 24th you didn't give him any treatments? A. No, sir.

Q. Is that your office record you have there?

A. Yes, this is my office record.

Q. May I look at it?

A. Yes, you may look at it. Here are the notations, if you wish to look at them.

Redirect Examination

Questions by Mr. Lord:

Q. In handling this case, Doctor, did you come to any conclusion that there had been a deep-seated injury of any kind? A. Yes.

Q. And what did you think of it yourself?

(Testimony of Dr. Paul B. Firth.)

A. I thought it was very severe. I might state, I have X-rayed 32,000 people in Portland, most of them working people, many of them accident cases. I have seen few injured as bad as Mr. Pletz is, and still be on his feet. I would state that [115] before anybody. It was so bad in his lumbar region that I would not treat him in that region, feeling that it might increase the injury, and I advised service to be rendered in his behalf in the cervical region, as Dr. Coe has outlined to you.

Q. Did you find disability present in the cervical region at the time?

A. Yes. Mr. Pletz had severe headaches, and also severe pain up and down the cervical region from the base of the occiput down to the shoulder.

Q. And did you think that he was really suffering during that period of time that he was under your supervision?

A. There is no question about it, it was seven months from the time he was injured, and there was severe pain, there was a marked condition involving the lumbar region, and I made my notations on my card at that time in red ink because sometime after this, and I believe during this time, there was another doctor relieved me, and I wanted to be assured that no treatment or service was rendered in his lumbar region. So I made this notation. On my vacation,—I went on my vacation there in the latter part of June, and I wanted to make sure

(Testimony of Dr. Paul B. Firth.)

of that, and that was the reason for this notation in red ink.

Q. Was that because you thought there might be some condition similar to a fracture there, or something?

A. Yes, I was afraid that an increased thrust there, or an adjustment that we give, I don't know whether you gentlemen are acquainted with our work, but we do what we call adjustment of the spinal column, that is all I do, and I was afraid to do this with the severe traumatic condition that was present, that it [116] might injure the man, and of course we wouldn't want to do anything like that.

Further Cross Examination,

Questions by Mr. Beckett:

Q. Well, just what did you do to him? You say you gave him twenty-four treatments.

A. The service Mr. Pletz was rendered was in the cervical region only, to relieve the headaches and to relieve this severe tension in his neck; nothing was given in my office to Mr. Pletz in his lumbar region, no service was rendered there.

The Commissioner: Did your treatment in the cervical region seem to help him?

A. It benefited Mr. Pletz considerably at the time. It did him a lot of good. I feel in my own way, I don't know what Mr. Pletz feels now, but at the time he was in my care he improved.

The Commissioner: At least he got temporary relief?

A. Yes, he did.

Mr. Beckett: That is all.

Mr. Lord: That is all the questions I have to ask.

(Witness excused.)

MR. GUS PLETZ,

the claimant, having been previously duly sworn, was recalled as a witness on his own behalf, and testified as follows:

Direct Examination,

Questions by Mr. Lord:

Q. Now, Gus, in this matter of compensation, did Mr. Pickett ever tell you that he wasn't going to pay you compensation, and if he did tell you, give us the date he told you the first time. [117]

Mr. Beckett: This whole question has been gone into, it seems to me, very, very extensively on the prior hearings in this matter, about the offers of compensation and the times he was up to see Mr. Pickett, and the conversations that they had, and all of those matters, and it seems to me at this time in the proceedings it is rather late to go into that phase of it, Mr. Marshall.

The Commissioner: If he goes into it further, I am going into it further by questioning this man, too.

Mr. Lord: Well, that don't scare me.

The Commissioner: No, I know, but then I want this record clear.

(Testimony of Gus Pletz.)

Mr. Lord: I don't mean to be impudent at all.

The Commissioner: No, I understand.

Mr. Lord: I am just telling you that all we want here is the truth, and we haven't got anything that we are trying to hide under a bushel or a barrel. My purpose was to further develop the question of a time waiver of filing a claim under this act by repeated promises made during the time within which he could legally file a claim up to November 12th, 1936, that a settlement would be made, and that those promises continued afterward, and the estoppel is——

Mr. Beckett: He testified at great length before that he wanted a lump sum settlement, and he wanted continuous medical care, but that he couldn't get it.

Q. Gus, you were hurt on November 12th, 1935, weren't you? A. Yes. [118]

Q. Now, November 12th, 1936, you bear that date in mind now—— A. Yes.

Q. That would be one year after you were hurt.

A. Yes.

Q. Now, during that first year did Mr. Pickett ever say anything to you about paying you compensation? A. Yes, he did.

Q. What did he say?

A. Well, the first time that I come up there he says, "Of course I have to pay you the compensation, but", he says, "I had better want to settle with

(Testimony of Gus Pletz.)

you later on," he says. That was the very first time I was up to his office.

Q. Now, about what date would that be?

A. Well, I don't know, I couldn't say; it was about three or four months, it was right away after I was out of the hospital for a while.

Q. It was, anyhow, before November 12th, 1936?

A. Yes.

Q. Gus, what is it you mean about Mr. Pickett saying he wanted to settle, what was he referring to?

A. He was going to give me a lump sum.

Q. And did you ever talk that again with him about getting a lump sum?

A. Yes.

Q. And did you want a lump sum?

A. Yes. [119]

Q. And how many times did you talk to him about a settlement?

A. Well, I have been up to him about a dozen times during that year.

Q. That is at least a dozen times?

A. Yes.

Q. Do you know where Mr. Pickett's office was at that time, in the year 1936?

A. Yes.

Q. Where was it?

A. Up in the Failing Building, up there on the—

Q. On what street was it?

A. On Fourth and Washington.

Q. Well, now, it is really on Fifth and Washington.

A. Yes, on Fifth and Washington.

(Testimony of Gus Pletz.)

Q. And did you ever go to his office?

A. Yes.

Q. How often did you go to his office?

A. Oh, I don't know. Like I said, I was up there dozens of times.

Q. And did you talk to him personally?

A. Yes.

Q. And did you go into his office where he was?

A. Yes.

Q. And did he talk to you over the table?

A. Yes.

Q. And did he say anything to you about giving you a lump [120] sum settlement, and if he did, what was it?

A. Yes, he asked me what I wanted, and I told him, "If you would give me doctor care, and if I could get a job what I could do for the time being, and three thousand dollars", and he says he will refer it to his company. That is the first time.

Q. The first time you went there?

A. No, not the first time,—he said we would settle later on, and after that we always would talk about settling it.

Q. And did he say anything to you about not bothering with lawyers, or anything that way?

A. Yes, we talked about that, too. I didn't have no lawyer at all then.

Q. No, but you knew me, though, didn't you?

A. Yes.

(Testimony of Gus Pletz.)

Q. And did he say anything,—did you tell him that you knew me? A. No.

Q. You didn't say anything to him about me at all?

A. No, I didn't mention anything.

Q. The fact is that he just talked to you about settlement? A. Yes.

Mr. Beckett: Don't lead him so.

Q. Now, Gus, take November 12th, 1936, in your mind, now think of that hard, did you ever talk anything about a lump sum piece of money after November 12th?

A. Yes, about in January or February, after,—that was in 1937, I think. [121]

Q. Have you got your dates correct now, 1937?

A. Yes.

Q. All right, go ahead; what was said?

A. I went up to Mr. Pickett, in the meantime I was up to some other doctors and had some examinations, and they told me, and so I decided to take the compensation, then, in order to keep the doctor. So I went up to Mr. Pickett about in February or March, or something around that, and then he said, "Oh," he said, "you will be all right, just wait until it gets warmer, then maybe you will feel better and then we can settle it." I still let it go; and then finally I insisted to take the compensation, and then he told me, "You have to file first a claim, with Mr. Marshall." I didn't know that, so he asked the girl in the office to fill it out

(Testimony of Gus Pletz.)

for me, and I dropped that letter in the mail box.

Q. You say you wrote a letter and put it in the mail box?

A. I let the girl fill it out.

Q. Yes, fill out the form?

A. Yes, fill out the form, and I dropped it in the mail box.

Mr. Lord: You told about that before.

The Commissioner: I want to ask him some questions there, I want to straighten out one matter.

Mr. Lord: Well, I, of course, am going to interpose an objection on the grounds that the relations are quite confidential between the Commissioner and the claimant. I will make that objection. It will be agreeable with me, however, to take it under the objection.

Further Questions

By the Commissioner:

[122]

Q. Mr. Pletz, before a year had passed after your injury, did you not come to see me personally?

A. Yes.

Q. At the office of the Oregon State Industrial Accident Commission when I was holding hearings?

A. Yes.

Q. And when I was free you had a conference with me? A. Yes.

Q. And did you not at that time say that you had an attorney?

(Testimony of Gus Pletz.)

A. That was after, that was in 1937.

Q. No, I am asking you in the year before, just before one year had passed after your injury.

A. No, Mr. Marshall, it was after.

Q. And didn't you say at that time—I will not use any names—but didn't you at that time give me the name of a law firm other than the law firm of Mr. Lord? A. Yes.

Q. Didn't you have an attorney other than Mr. Lord before that?

A. I didn't have any attorney whatever, I just went up to one and asked him if I could take the compensation, and he said he could break that law, that case, and I didn't want to bother around, I did not go a whole year up there.

Q. And did you say to me that you were not satisfied with the low rate of compensation that was offered to you by Mr. Pickett?

A. Yes, because my earnings were higher. [123]

Q. I know, I am not arguing this, I am trying to straighten it out, did you not say that you were not satisfied with the low rate of compensation that was offered to you by Mr. Pickett?

A. Yes.

Q. And didn't I explain to you that if your earnings were higher there would be no difficulty in securing a proper readjustment, and that the information about your earnings could be secured from the payroll records?

A. I couldn't remember that.

(Testimony of Gus Pletz.)

Q. What I am driving at is, the only matter you took up with me was the matter of the low compensation rate?

A. Yes, you told me you couldn't do anything any more because it was out of your hands, because the year was up, and that——

Q. (Interrupting) That is the time later. I am talking about before that.

A. No, I never did see you before, Mr. Marshall. I saw you the first time after I filed that claim. Then Mr. Pickett told me that it was outlawed, then I come up to see you up there, but I never did see you in the year, I didn't know then that I have to, I thought Mr. Pickett could settle it all by himself.

Q. Now, wait, you told me the name of one law firm that as far as I knew was handling it the way you described it, and then later a claim was filed. When did you engage Mr. Lord in this case, before or after the claim was filed?

A. After. I didn't know that I have to have an attorney. [124] I thought that Mr. Pickett according to his talk, he could settle it all.

The Commissioner: That is all I want to ask him.

Redirect Examination

Questions by Mr. Lord:

Q. Now, Gus, you thought at first you had a third party claim, didn't you, against a ship?

A. Yes.

(Testimony of Gus Pletz.)

Q. That is when you were up there in the hospital? A. Yes.

Mr. Beckett: He testified before that he knew all the time he didn't have it.

The Witness: They told me all the time that I had a third party claim.

Q. Who told you that?

A. Oh, some guy.

Q. Now, who was it, you had talked to lawyers then, hadn't you? A. Yes.

Q. And then I come up to the hospital, didn't I?

A. Yes.

Q. And what did I tell you?

A. You said no, there was no third party claim.

Q. And what else did I tell you—when was that, that was right up there at the time that I first went up to the hospital, wasn't it, Gus? A. Yes.

Q. And somebody said something about booting this law? A. Yes. [125]

Q. And I said that was all "bull-shit"?

A. Yes.

Q. But then you didn't go back to see those lawyers for a long time?

A. No, I didn't, not for a long time. That is the way the other law firm misleads me that way. You see I didn't want to make no trouble for anybody, and I told Mr. Pickett, "Why should I employ a lawyer if we could straighten it out ourselves?" and according to his talk he wanted to settle with

(Testimony of Gus Pletz.)

me all the time. He even offered it to me the first time when I was up there.

Cross Examination

Questions by Mr. Beckett:

Q. Well, now, pretty soon after your accident you talked about this matter with Mr. Green's firm, B. A. Green's firm, did you not?

Mr. Lord: Now, this is a closed record——

The Commissioner: I purposely omitted the names, but spoke of a different firm, but you can specify it if you want to.

Mr. Lord: I don't like to drag lawyers in, they will claim that I am inciting this, and all that sort of stuff.

The Commissioner: That was the firm, though, that Mr. Pletz named to me, yes.

Mr. Lord: But I am not inciting anything.

Mr. Beckett: I am the one that is bringing the name in.

The Commissioner: You go ahead, you go ahead without any hindrance. [126]

Mr. Beckett: I don't want to embarrass you or anything.

Q. Well, now, pretty soon after your accident, you talked about this matter with Mr. Green's firm, B. A. Green's firm, did you not? You talked with them about it, didn't you?

A. Yes, I was up there for, first about the compensation:

(Testimony of Gus Pletz.)

Q. First about the compensation?

A. Yes, first about the compensation.

Q. How many times were you up there?

A. Once I was up there in a whole year.

Q. Once you were up there in a whole year?

A. Yes.

Q. And was that before or after you talked with Mr. Lord?

A. Before.

Q. Before?

A. Yes.

Q. And were you in the hospital the second time at the time you talked to Mr. Lord about it?

A. Yes.

Q. Talked about this case?

A. Yes.

Q. About a third party case, were you talking about a third-party case?

A. Mr. Lord says, "There is no third party case."

Q. Mr. Lord says, "There is no third party case"?

A. No.

Q. And did he tell you to take the compensation?

A. Yes. [127]

Q. At this other hearing the question was asked, "Did you make repeated efforts to get your compensation re-fixed, or not?"

A. Yes, I tried, and I also asked Mr. Pickett if he could get some kind of an agreement, I did need money but I didn't want to let the doctor go. Mr. Pickett said he was willing, he would rather make a settlement with me than pay compensation.

(Testimony of Gus Pletz.)

Q. You testified also, "Yes, later on he did offer me that again", meaning compensation check, "he talked with me again and he said 'Why don't you take the compensation?', and I said, 'It wasn't enough and if they would give me a little more I would take it'." What you were talking about all the time was the amount of compensation, wasn't it?

A. No, we only talked twice about compensation. He offered me it the first time that I was up there, and then he told me he would better want to settle with me later on, and then later on he says, "You had better take the compensation, it is just as good", he says. But always he was settling with me, always he was talking, what I want. But he never did want to give me the doctor, you see, and I wanted to get the medical care.

Q. That is, he wouldn't agree to give you perpetual medical care?

A. No, he wouldn't agree to, he was going to give me a lump sum, but it had to be a final settlement, is what he told me. [128]

The Commissioner: After your injury didn't Mr. Pickett offer to pay you the compensation?

A. Yes.

The Commissioner: And didn't you refuse it because you didn't think it was enough per week, the rate wasn't high enough?

A. Yes, it wasn't enough.

The Commissioner: It wasn't enough per week, you thought your earnings were higher?

(Testimony of Gus Pletz.)

A. My earnings were higher, in fact.

The Commissioner: But you thought you were fairly entitled to a higher rate of compensation per week because your earnings were higher?

A. Yes.

The Commissioner: And for that reason you wouldn't take it?

A. No, not only that, I had a little money and I thought the money was as good there as if I had it, if I had it I could spend it, and Mr. Pickett said that he would settle with me, and I thought that I had that money there, and I could have it at any time I wanted it.

The Commissioner: Didn't he offer, after you were injured, to pay the compensation?

A. Yes, he offered to pay the compensation.

Redirect Examination

Questions by Mr. Lord:

Q. As I understand it, Mr. Gray come up first?

A. Yes, Mr. Gray come up first in the hospital.

[129]

Q. And he told you first, before the compensation was due, that he would give it to you in advance, didn't he?

A. Yes.

Q. And after you first got in the hospital, did you talk to any lawyers, or not?

A. No.

Q. You didn't talk to any lawyers at all at that time?

A. No.

(Testimony of Gus Pletz.)

Q. And the first period you were in the hospital you didn't discuss the matter with any lawyers?

A. No.

Q. And when was it you was told that this act wasn't constitutional, or something that way?

A. The first time you told me.

Q. The first time I told you what?

A. Mr. Green, he is responsible for it all; otherwise I would never have gone up there, see.

Q. I never told you the Act wasn't constitutional?

A. No; no.

The Commissioner: He is speaking about Mr. Green now.

Q. You didn't know when you were in the hospital when Mr. Gray came up there the first time anything about a lawyer, you had never talked to any lawyers?

A. No, I never talked to anyone.

The Commissioner: Isn't this a fair statement of the situation: That the insurance carrier offered to pay you an installment of compensation, and you thought that your earnings [130] would justify a higher rate than they offered, and you were not satisfied with that rate and you refused it?

A. Mr. Gray himself told me that I can raise it after a while a little bit, but he never did offer me any more.

The Commissioner: All right, was it then after the hospital that you first went to see the other attorney, or when was it?

(Testimony of Gus Pletz.)

A. When I got out of the hospital.

Q. (Mr. Lord) Then you went to talk to Mr. Pickett about the case? A. Yes.

Q. About the claim? A. Yes.

Q. And they offered you a little bit more money than they had?

A. No, they didn't do anything.

Q. They just talked settlement and talked settlement?

Mr. Beckett: He said in here repeatedly that compensation was offered and refused.

The Commissioner: Yes, he said that compensation was offered and refused at that rate.

Mr. Beckett: I think in view of what has transpired here, and for the sake of this record, this is referred back here by the Federal Court, and I judge by what has transpired here, and Mr. Marshall's questions, that this man came to see him prior to the expiration of one year?

The Witness: That is not the truth.

Mr. Beckett: And I think in fairness to everybody [131] that Mr. Marshall ought to make a statement of the facts in this record.

The Commissioner: Well, the statement that I will make is simply this: That he came to me while I was holding hearings in Portland, and said that he, he mentioned the name of Green, Tanner & Boesen, and said that he was not satisfied with the rate of compensation that had been offered to him, and I explained to him that that question could be

(Testimony of Gus Pletz.)

straightened out by referring to the payroll records, and they were open and accessible to him, and in that conversation he also stated that the attorney that he referred to, whom he had consulted, had said something about he could break the Act. I don't know whether Mr. Pletz used the word "unconstitutional", but that was the tenor of his explanation to me, and that was all that was said at the time of that conversation.

Mr. Becket: What date was that?

The Commissioner: Oh, I don't know the date, but it was some months after the injury, it was sometime after the injury, but I can't positively say the exact date, because I don't know.

Mr. Beckett: It was some months after the injury?

The Commissioner: Yes, it was some months after the injury.

Mr. Beckett: You are not of the impression that it was over a year after?

The Commissioner: No, I don't think it was. He is of the impression it was. [132]

The Witness: Yes, it was, Mr. Marshall. Mr. Marshall, do you think I would not have gone to all this trouble and wrote you a letter before I didn't know I had to file a claim with you?

The Commissioner: You knew I was the Deputy Commissioner here. The boys know where to come if they have trouble?

A. That is the trouble, I have been talking with so many men, and not a one advised me of you. I

(Testimony of Gus Pletz.)

just thought I would see you when I couldn't get along with Mr. Pickett.

Mr. Beckett: As I said, I had no idea what is to be produced here today, very naturally couldn't know. The record was made up before, and I will want to at least call Mr. Pickett in view of this testimony which has been given here, as a witness, and I may have somebody else, I don't know, but at least I want that opportunity.

Mr. Lord: Well, I would assume that you would be entitled to it.

The Commissioner: Yes, surely.

Mr. Lord: When do you want to do that, tomorrow morning at nine o'clock?

The Commissioner: I have got another hearing at nine o'clock in the morning.

Mr. Lord: Gus, who was up there among the boys when you talked to Mr. Marshall?

A. I don't remember.

Mr. Lord: Now, you can remember who was up there at the hearing that day, just study and think.

The Commissioner: If he could do that, I could find [133] out what the date was.

Mr. Lord: Yes, who did you see up there at the hearing the day you were up there? You know those fellows, somebody was up there when Mr. Marshall was there. Who was in the room there with Mr. Marshall?

A. I don't know, I don't remember.

(Testimony of Gus Plets.)

Mr. Lord: Well, now, you think it up and remember.

The Commissioner: I wish he could definitely remember, then we could find the exact date.

Mr. Lord: You think that over, Gus, now. Who was it that was up there?

The Commissioner: I will set it for the next time.

(Hearing concluded.)

[Endorsed]: Filed July 8, 1941. [134]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commission, at Portland, Oregon, on the 13th day of May, 1939.

Appearances:

W. P. Lord

For the Claimant

H. B. Beckett and Wendell Gray

For the Employer and Insurance Carrier. [135]

DAVID C. PICKETT,

is called as a witness in behalf of the employer and insurance carrier and after being first duly sworn testified as follows:

Direct Examination**Questions by Mr. Beckett:**

Q. Mr. Pickett, during all the time and for some time prior thereto, and during the year and a half or two years, or for that matter up to now, you were the attorney adjusting and handling claims for the Firemen's Fund Insurance Company, were you not, in this Court? A. Yes, sir.

Q. And when Mr. Pletz received his accident here, that matter was referred to you?

A. Yes, sir.

Q. The matter was reported to you by the employer in the ordinary course and you proceeded on behalf of the insurance carrier to handle the matter from that time on? A. Yes, sir.

Q. Now, will you tell Mr. Marshall here when you first saw Mr. Pletz and just what was done, what conversation you had with him first, I mean with Mr. Pletz, in reference to his being entitled to compensation, and the payment of compensation?

A. Now in answering that do you want me to go back and tell what I had to do with it as far as seeing that the compensation was sent up to Mr. Pletz at the hospital?

Q. You might just tell what you did in handling that, yes. [136]

(Testimony of David C. Pickett.)

A. After the accident had occurred and while Mr. Pletz was in the hospital, I had Miss Anderson, who does that work in our office, that is, Ruth Anderson, make an investigation at the hall to ascertain the rate of compensation to which Mr. Pletz would be entitled, because the injury was such that it looked as though it would go beyond a few weeks or beyond one week, and in that case I had them immediately get a report from the hall.

The Commissioner: As to the earnings?

A. Yes, as to the earnings. That report is always a little short of what the actual earnings eventually will be because the bookkeeping is not up to date. That is, it is as much as two months behind, and when you get the report, you lack about two months of the man's earnings. Other times it is up closer but it is never up to that exact day. And they reported from the hall that the earnings were such that he was entitled to a compensation rate of \$14.23 a week, and I had that sent to Mr. Pletz at the hospital to pay him for the second week, eliminating the first week.

Q. You had a draft for that amount of money sent up to him?

A. Yes, and that, I think, was taken up by Mr. Wendell Gray.

Q. Who was in your office?

A. Yes, Mr. Wendell Gray was in our office at the time. That check was refused and brought back. Mr. Pletz, as I [137] recall it, remained in

(Testimony of David C. Pickett.)

the hospital until about December 22nd or 23rd, the exact day I am not certain, but after he was out of the hospital he came up to my office and I offered him the compensation again, but I didn't have the draft drawn that time. I merely told him that I would pay him.

Q. Just what conversation did you have with him when you saw him later on about the compensation?

A. Well, at that time I told him that we had rechecked the earnings, and while they might be a little short, they were approximately right, as far as the report from the hall was concerned, and that he was entitled to \$14.75, instead of \$14.23, that we had previously offered him. He complained, among other things that that rate was not high enough and that he had a lot higher earnings. That he knew lots of people who were getting \$20 and \$25 on the waterfront that didn't do any more work than he did. And I told him that I was bound by the report from the bookkeeping department of the Employers but if he could bring in any other earnings we would check them, or he could go down to the waterfront and check them himself, but at any rate, if he was entitled to a higher rate, the acceptance of the amount I offered him would not prejudice his rights, but when it was finally found out what he was entitled to as a rate of compensation, that would be made up to him. He was in a time or two before he went back to the hospital. He went

(Testimony of David C. Pickett.)

back to the hospital again on February 12th. The last [138] time he was in he was in to discuss with me going up to Dr. Harry Blair and he did go to Dr. Harry Blair, and Dr. Harry Blair suggested that he go back to the hospital. But during the times that he was in, I had in mind that he might not feel that I was telling him the truth regarding his rights when I told him that he wouldn't prejudice his rights when he took the rate of compensation I gave him, and that he could proceed and collect the higher rate, if he was entitled to it, and so I suggested to him that he see Mr. Marshall, the Deputy Commissioner that administered this Act and question him about his rights along this line. At that time, during those conversations, his part of the conversation was primarily that he was entitled to a much higher rate of compensation than I was offering him.

Q. Was there any talk or discussion with him or did he say anything about wanting a lump sum settlement and medical aid?

A. I think that he did not come up until after he had gone to the hospital and come back again.

Q. Do you know whether he went to see Mr. Marshall as you suggested, or not?

A. Well, to carry that out a little further, regarding whether he saw Mr. Marshall, after he came back from the hospital—he entered the hospital the second time February 12th and was out about March 13th.

(Testimony of David C. Pickett.)

Mr. Lord: What date was that? [139]

The Commissioner: February 12, 1936; it was, and was out March 13th, 1936.

The Witness: Yes, and I took that from Mr. Pletz own testimony. I guess that is right. When he was out of the hospital he came back up to the office and at that time he was beginning to talk about a lump sum settlement, that he wanted a lump sum settlement. And it isn't a case in which I could ordinarily give a lump sum settlement, and while we talked about it some, I again urged him to take compensation and when the question of the rate came up I told him that I would pay him whatever the record finally showed he was entitled to. By that time we had checked it again and had more earnings and he was entitled to \$14.99, but whatever it was if he could make a showing of a higher rate of compensation I told him that we would pay him whatever he was entitled to and I again urged him to see Mr. Marshall upon this proposition of accepting our rate, that accepting our rate wouldn't prejudice him in collecting a higher rate if he could come before Mr. Marshall and show that he was entitled to a higher rate. We had several meetings after that. I am only going to give this as it leads up to what I know about him seeing Mr. Marshall. About the latter part of June he came to my office and wanted to be treated by a chiropractor by the name of Dr. Firth.

The Commissioner: That was in August?

(Testimony of David C. Pickett.)

A. Yes, that was in August. I had no authority to authorize [140] treatment by a chiropractor and I told him so and he said that the chiropractor done a lot of others good and he thought it would do him good and he wanted to be treated by one, and I told him that I had no authority to authorize it. He made this suggestion during the conversation: that the company certainly wouldn't be opposed to paying Firth if Firth treated him and he got back to work and was all right. And while I couldn't authorize it, I personally felt that that probably was about true, too. And he went and had the treatment. And I don't know when he did come back about it except that he testified that he came—in the trial before Judge Olsen's Court on this matter—he testified that he came back to me about Firth's bill in August. Firth had treated him, ending the treatments some time in July and he came back to see about my paying the bill, and I again told him that I couldn't and the question came up about my right, or the employer's right absolutely to choose the doctor and the right of the employee, the injured employee, to choose the doctor. And I explained that that rested entirely with the employer. He was in in August and he was in in September about this bill, and I think while he was in in August, but I wouldn't want to say whether it was August or September, while I was suggesting that he go to see Mr. Marshall about his rights respecting the doc-

(Testimony of David C. Pickett.)

tors and I also again urged him to go see about his rights regarding the rate of compensation. During one of those conversations [141] he said that he had already been to see Marshall. Now, I don't know whether he had seen him about the rate of compensation or whether he had seen him about the doctor. I never got a very clear understanding because when I asked him what Marshall said he didn't tell me. He then went on about what he wanted, and what he thought he ought to have—and by that time and for a considerable period of time before that, he had been asking for a lump sum settlement. But it was either in August or September that he told me this, because in September is when he and Dr. Firth finally wanted me to submit the matter to the insurance company and see if they wouldn't pay the bill. And I asked them to furnish me with a statement, which I had never had, or a bill, and they furnished me with a bill and that was furnished in September. But at one of those meetings, either in August or September, he told me that he had seen Mr. Marshall.

Q. Mr. Pickett, during your various conversations with Mr. Pletz about this matter, did he at any time or times tell you that he had a lawyer whom he consulted, or who represented him?

Mr. Lord: It is very obvious that Mr. Pickett was sending him up here to Mr. Marshall. He couldn't have had a lawyer.

(Testimony of David C. Pickett.)

A. Yes, but he never told me who the lawyer was at all. I asked him, but he didn't tell me. That was the time when we were discussing his bringing some kind of a suit against me [142] and I tried to explain to him that he didn't have the right of suit, and he said that he had received advice, that he knew what he was doing, and that he had checked up on it. But when I asked him who he had seen, he never told me.

Q. Did you ever see Mr. Pletz in the lawyer's office?

A. Once.

Q. Where was that?

A. At Green, Boesen & Tanner's office. That was while Tanner was in the firm. I was over on another matter and Pletz was in there. I have the recollection that I saw him there twice, but I wouldn't say for sure, I wouldn't say I saw him twice, but I know I saw him there once. He was sitting there waiting and I went in and saw Boesen while I was there.

Mr. Lord: Dave, can you give us any idea what date that was?

A. Not the exact date, except as I connected up with a case that I was handling at that time, and the one I went over to see about and it was in the summer, or leading up to September of 1936. And I looked up the case last evening to see when it was and I found that it must have been some time prior to September, 1936, because I was over there several times on that case. There was another matter

(Testimony of David C. Pickett.)

that came up at that time that I think might be of interest in his connection; I didn't right at the time connect it with the Pletz case, but looking [143] back at all that has transpired, I think it does connect up with the Pletz case, and that is while I was over there on this particular case two members of the firm got into quite a conversation with me about this question of whether the longshoremen's and harbor workers' compensation act applied to a longshoreman who was employed directly by the boat and handling cargo on the boat, and their argument to me was that that didn't—that claim, when a man is hurt, didn't come under the Longshoremen's and Harbor Workers' Compensation Act, and we had quite a discussion about it. Nobody's name was mentioned, but they argued with me that that didn't come under the Longshoremen's and Harbor Workers' Act, that a man was a seaman and therefore not under the Longshoremen's and Harbor Workers' Act.

Q. That was Boesen and—

A. And Tanner. It was Boesen and Tanner that I had the conversation with, and that was while I was over there on this same case. When I saw Pletz there and had this conversation was all prior to September 17, 1936, but I would have no way of placing when I was in there at that time.

Q. Now, during all these various times that you saw Mr. Pletz and he was in your office you gave

(Testimony of David C. Pickett.)

him to understand, and in fact at first quite strongly urged him to take his compensation, did you?

A. Yes, sir. [144]

Q. And inasfar as you know or inasfar as any of your dealings with Mr. Pletz were concerned, was he in any way misled or misinformed or played along, as you might call it, with the idea of having him lose or waive any of his rights?

A. No. He gave me to understand thoroughly that he had seen a lawyer. In fact, his conversation regarding the case led me to think he must have seen a lawyer, and it never entered my mind but that they had their plans, whatever it was, and that—well, I just never thought about his becoming delinquent in it, the thought never occurred to me. I don't think that we ever have those, when a man has a lawyer, I don't recall of another instance now that this question arose of his being delinquent where he had a lawyer, at the time I don't.

Mr. Beckett: You may cross examine.

The Witness: Before you go to the cross examination there are one or two things that I would like to say, or rather I will wait, maybe Bill will bring them out.

Mr. Lord: No, go ahead, Dave, with anything you want to say.

The Witness: And that is this: a great deal has been said here about me talking to Mr. Pletz about a lump sum settlement, and in the last testimony Mr. Pletz said several times that I said that I

(Testimony of David C. Pickett.)

wanted to settle with him on a lump sum basis. The truth is, I discussed a lump sum settlement [145] merely because he made me discuss it, because he came in and wanted to talk about that. He came in in the first instance and when he first started in about a lump sum settlement, I don't remember how high his first demands were, but they eventually were \$6,000 and permanent medical care, and I think they were higher than that at one time, because I explained to him the question of a settlement on our part, even if it could be done, and even if the conditions were right to make a settlement, that we wouldn't be interested in it in any circumstances when what he was demanding ran beyond the limits of our policy, and that was \$7500, and what he was demanding would look to me like it would run beyond, more than \$7500 and later on he came back and made this offer of \$6000 and \$1500 medical care, a total guarantee of \$1500 toward medical care. And I explained to him again that I would not even submit that to my company because there would be no object of making a lump sum settlement, even if it could be made, when his demands ran so close to the total amount we had to pay. And then I told him also that to interest the company in a lump sum settlement the amount had to be down where it was something of a compromise and the company could see that there was a saving in it rather than pay the compensation, and that, of course, is regardless of the possibility of making a settlement or not.

(Testimony of David C. Pickett.)

And I also explained to him that there were about only two ways that [146] we could make a lump sum settlement even if we arrived at the amount. One was, if there was a third party claim—and I told him many times that there was no third party claim—and the other was where he would reach the point where he wasn't disabled but was able to return to work. Now when the evidence would show that he was able to return to work, and that could be submitted to Mr. Marshall, if it was a claim that looked like it was going to be troublesome; I thought by adding on to the amount he was actually entitled to we could have reached a lump sum settlement, but that would have to be the evidence before Mr. Marshall and show that he was really no longer disabled and able to return to work.

The Commissioner: I would like to ask you a question there because you are on that subject. You have handled a good many claims for the Firemen's Fund in this district under this Act?

A. Yes.

The Commissioner: Now, any discussion you had must have recognized the fact that the Commissioner had no authority to issue any order that would end your liability unless the fact with respect to disability warranted it?

A. Yes.

The Commissioner: Because I am clear we have had so many discussions on that question and on these cases where lump sum settlements are or-

(Testimony of David C. Pickett.)

dered that I can't conceive of you [147] not being clearly advised as to any feature of it?

A. Yes, that is right.

The Commissioner: And certainly in regard to a lump sum settlement, not only must it have the approval of the Deputy Commissioner, but it must have the approval of the United States Employees' Compensation Commission.

A. Yes.

The Commissioner: You were advised as to that were you not?

A. Yes.

The Commissioner: I just wanted to clear up that one angle.

The Witness: Yes, and that is what I had in mind in working out a lump sum settlement. The evidence would have to show that the disability had actually ceased, and that all the payments were in the past. You see what I mean, Mr. Marshall?

The Commissioner: Yes.

Mr. Beckett: Is there anything else you want to speak of?

The Witness: No, except I wanted to—in view of all that has been said about the lump sum settlement, we had many discussions and I couldn't make him understand that I was sincere in the point that I couldn't make a lump sum settlement under the conditions that existed. He seemed to think that I could. I think that is all. I wanted to clear that up about [148] the lump sum settlement, because I

(Testimony of David C. Pickett.)

was not really interested in it under the conditions that he demanded.

Mr. Beckett: You may cross-examine, Mr. Lord.

Cross Examination

Questions by Mr. Lord:

Q. Dave, he was around your office a good many times, wasn't he?

A. Yes, I couldn't say how many times, or exactly the times, or when it was but he was in there frequently.

Q. He came to your office as soon as he was released from the hospital after November 12th?

A. Well, he came in between December 24th and that other date when he went back to the hospital, he came in between December 24th and February 12th, December 24, 1935 and February 12, 1936.

Q. Now in the meantime you had had Mr. Gray go to the hospital and confer with Mr. Pletz, had you not?

A. Mr. Gray had, I hadn't.

Q. No, but you had directed him?

A. Mr. Gray had gone up representing our office, yes.

Q. And he went up there armed with a draft for a certain sum of money?

A. \$14.20 is my information on that.

The Commissioner: Twenty-two cents.

The Witness: Just a minute, \$14.22.

Q. Have you the date of that draft, Dave? [149]

(Testimony of David C. Pickett.)

A. No, I don't. I think she told me it was February 26th, I just talked to Miss Allen on the telephone.

Q. What do you mean, February 26th of what year when Mr. Gray went up there?

A. November 26th, 1936.

Q. 1935?

A. Yes, 1935, while he was still in the hospital, after November 12th.

Q. Now, the fact of the matter is you were sort of paying him off in advance, were you not? Compensation wasn't on that date due for any period of time, was it?

A. Just a minute now, that was November 26th. I told you his payment became due on November 26th. We tendered it to him the exact day it was due.

Q. Now, in the meantime Mr. Gray had been to the hospital and offered him some money, hadn't he?

A. No.

Q. Are you sure about that?

A. That is the time that he was at the hospital and offered him.

Q. You say he was up at the hospital for the purpose of talking to Mr. Pletz about the manner in which the accident occurred?

A. Well, Mr. Pletz didn't want to talk to him, as I recall it, and he went back, and the next time he went back to get the [150] facts, he took this draft with him, and our records show that was November 26th, the day it was due.

(Testimony of David C. Pickett.)

Q. And you didn't in this case—it hasn't been the policy in any of these cases covered by the Firemen's bond, on these Harbor Workers' cases to offer compensation or offer money in advance?

A. Oh, yes, it is quite an ordinary thing for us to pay compensation before the first week is out, because they come up there and they say they are broke and they need the money and I advance it.

Q. Yes, that is what I understand.

A. And we advance it frequently, two or three days after the accident, two or three days after the accident, when they are not entitled to it until fourteen days after the accident. I did that yesterday on a man because he said he needed the money. It is quite the usual thing to do that.

Q. So in this case it is perfectly reasonable to believe the testimony that has been offered that Mr. Gray did, in point of fact, offer him money, offer him some money before the due date of the first payment?

A. Well, I understood that Mr. Pletz didn't want to talk to him the first time. Now I don't know about that. If he talked to him the first time, he might have told him he would pay him if he wanted the money. We would have paid it. But my understanding of the testimony is that Mr. Gray went up, [151] that was a day or two after the accident, and Mr. Pletz didn't want to talk to him, so he went back and the next time he went back it was near when it was due and he took the draft with him.

(Testimony of David C. Pickett.)

Q. Now, the fact of the matter is that the purpose of sending Mr. Gray up there was to get a statement as to how this accident happened so that you might secure a defense to any claim he might file against the vessel, wasn't it?

A. I don't know whether that would be a true statement, Mr. Lord, for the reason that it was just a routine matter of making those investigations of accidents. We always make some investigation.

Q. The purpose was not to find out how bad he was hurt, but it was to find out how the accident occurred, wasn't it? And to get a statement of how it occurred?

A. I didn't send Mr. Gray up to see how bad he was hurt, I would either rely upon the attending physician or the doctor. The purpose of the statement was to find out how the accident occurred. That certainly is true.

Q. Mr. Gray didn't get that statement the first time he went up there?

A. That is what I understand.

Q. Well, did you give him orders to still try to get a statement as to how the accident occurred?

A. I never gave him orders to try to get a statement as to [152] how the accident occurred, he knew what the policy of the office was.

Q. Now was it the policy of your office or the policy of the office of the Firemen's Fund?

A. Our office. I don't know what the policy of the office of the Firemen's Fund, outside of our

(Testimony of David C. Pickett.)

office is. What I mean is, I don't know what the Firemen's Fund does in any other office outside of our own.

Q. But as far as this man was concerned, you wanted a written statement as to how this accident occurred from the time Mr. Gray called on him and you asked him for it repeatedly, didn't you?

A. Well, I think he went up there once and didn't get it, because he wasn't feeling well and he went back again.

Q. Did you ever get it?

A. Yes.

Q. And signed by him?

A. Yes.

Q. Now that was before he got out of the hospital, or after he got out of the hospital?

A. I think the date we tendered the compensation, I am not certain, Mr. Gray could tell you about that.

Q. Well, now, he came down to the office some time the latter part of December, 1935? [153]

A. Or the first of January, 1936, I am not certain of which.

Q. Up to that time you had offered him how many checks or drafts on San Francisco?

A. You mean up to the time he come in?

Q. Yes. A. We offered the one.

Q. You offered the one? A. Yes.

Q. Now that wasn't offered him in money, was it?

A. In a draft.

Q. In a draft?

(Testimony of David C. Pickett.)

A. But he made no objection to the fact that it was a draft however.

Q. But it was only offered to him in the form of a draft on San Francisco?

A. Yes, and there was no question raised by him as to the medium we offered it in.

Q. Yes, I understand that. Now from the 12th of November on he was being treated by a doctor in the employ of the Fireman's Fund, wasn't he?

A. Well, may I ask you what you mean by "in the employ of the Fireman's Fund", Bill? I am afraid you have the wrong idea.

Q. Well, the point is this: what I mean by this, the Harbor Workers' Act calls for the employer or the insurance carrier [154] to furnish medical aid and hospital services to an injured employee, doesn't it? A. Yes.

Q. Now my question is as to whether or not that aid was not being furnished by a doctor of your own selection?

A. That is right. But when you put in the word "employer" Dr. Belknap is not in my employ except as to each case sent him.

Q. Yes, I did not say "your employer".

A. I understood you to say the Fireman's Fund. The Fireman's Fund pays for his services, just as the cases are sent to him, yes.

Q. I understand.

A. But he was our charge.

(Testimony of David C. Pickett.)

Q. He, then, rendered him services at the hospital, and that continued throughout the history of this case, didn't it?

A. Yes. I don't know whether he has quit yet, but I want to make some further explanation on this point.

Q. The fact of the matter was that Dr. Belknap was still rendering him service after November 12, 1937, wasn't he?

A. You mean November 1937 or 1936?

The Commissioner: 1937 you say?

Mr. Lord: Yes, sir.

The Commissioner: Yes.

The Witness: Do you mean 1936 or 1937? [155]

Mr. Beckett: No, 1936.

Mr. Lord: How do you know what I want to ask? What I am getting at is this, that he was rendering him service one year after the accident, in November 1936?

A. Yes.

Q. Is that right? A. Yes.

Q. And the Fireman's Fund was paying for that, wasn't it?

A. I am not so sure about that, Bill, that is the reason I would like to make an explanation about it when you get through with this line of questions.

Q. You also directed that he be given service by some other doctor, didn't you?

A. I had him examined by many doctors, but all of the time I kept Dr. Belknap primarily as

(Testimony of David C. Pickett.)

the main doctors, as far as I was concerned, although he was examined by lots of other doctors.

Q. You had him examined by Dr. Goldsmith, didn't you? A. Yes.

Q. And you had Dr. Goldsmith treat him, didn't you?

A. I had him treat him for a while, more as a—but primarily as an observer to see if he could determine any cause for these complaints that Mr. Pletz was making.

Q. You sent in the medical report to the Deputy Commissioner, did you, or Dr. Belknap? [156]

A. They were sent in to our office, Dr. Belknap would send them to us and we would send them on. I think the only medical report sent on by Dr. Belknap to Mr. Marshall was that first one. What is the number of that, Mr. Marshall?

The Commissioner: It is right here, 204, dated November 19, 1935.

Q. Now wasn't there a subsequent medical report?

A. I don't think so. When they refuse compensation those reports don't go on, and if that was handled in the ordinary way, no other report went on.

Q. Well, the fact of the matter is, Dave, in November 1936 your letter of November 6, 1936, you were advising Mr. Marshall that you were still consulting with doctors, and had had him treated and they found no objective symptoms and he was not really disabled.

(Testimony of David C. Pickett.)

A. Well, doesn't that letter really give what the doctors in the past—

Q. Yes?

A. Isn't it a culmination of all the findings, Bill?

Q. Yes. No, it isn't all, you are speaking of Dr. Goldsmith?

A. Yes.

Q. Then on March 8, 1937 you wrote Mr. Marshall: "None of the doctors to whom I have sent him can verify a claim of disability." So you must have been talking with the doctors, then [157] after November 12, 1936, as to his condition and knew that the doctors were treating him?

A. Well I don't know whether any doctor besides Belknap was treating him at that time, I am not certain about that.

Q. Well what I am getting at, Dave, as to whether or not any of these doctors, including Dr. Belknap, were rendering him medical aid under the requirements of the compensation Act, to which section I have just referred?

A. The only one aside from Dr. Belknap, that rendered him medical aid was Dr. Goldsmith, and that was primarily to hold him under his observation for a while to determine whether his views on his disability or lack of disability was correct. But it wasn't to make him the attending physician in any sense.

Q. Now, after November 12, 1936, what interest did you have in this case, what sort of interest was

(Testimony of David C. Pickett.)

there that you could—or what obligation could you feel that you owed to Gus Pletz?

A. Well, I would like to answer that by bringing in what I have repeatedly referred to as to which I wanted to make an explanation. Back in August or September of 1936, in my discussion with Mr. Pletz regarding a lump sum settlement, and the payment of compensation, he had made it very clear to me that he was not going to take compensation. From that time on I wasn't very clear in my own mind what my relation to Mr. Pletz was. As soon as it became apparent that he was going to urge [158] a lump sum settlement, either as the result of a direct suit against the employer, or as a third party claim—I notified the attending physician that I didn't know whether we would be liable under the act, or whether the payment would have to come out of whatever adjustment would result from his demand for a lump sum settlement. For instance, if he would sue a third party, we usually have an understanding with the attending physician that our liability under the act is not to be followed out, and that the collection will be—as the result of the lump sum settlement.

Q. In other words, you seek to protect the doctor against the possibility of his losing his money for his services?

A. And if there is a lump sum settlement, then I will see that his bill is paid. But in most of those

(Testimony of David C. Pickett.)

third party claims where compensation is refused and they threaten a suit of any kind, the attending physician begins to look upon him as he would if you were handling a liability claim rather than one in which there is automatically medical aid. And I notified Belknap back in August or September, 1936, that this man refused compensation, and it looked like there would be litigation on it and that he might have to look to the result of the litigation for his compensation. And we had several conversations after that:

Q. You knew, as a matter of fact then in September 1936 this man had a claim of some kind that he intended to make [159] for some sizeable sum of money?

A. Yes.

Q. And you had a conference then with these attorneys?

A. What do you say?

Q. You had a conference with these attorneys and they didn't tell you who it was that they were talking about?

A. Now you understand that they didn't bring up Mr. Pletz' name at the time I was there and it was only the development of it later that made me think it was the same case.

Q. You were just listening to what they said?

A. No, I was arguing back to them my side of it, too.

Q. And they were stating that where the boat caused the injury that the claim would be against the boat, like under the State Lien law?

(Testimony of David C. Pickett.)

A. What?

Q. The claim would be against the boat, like the State Lien law, that the boat was the individual?

A. I think they were of the idea that it came under the Jones Act, not under the Harbor Workers' and Longshoremen's Compensation Act, but that they could sue the boat direct on a straight liability claim.

Q. That was in September, 1936?

A. Prior to September, 1936. I wouldn't want to set the [160] date.

Q. Did you see Mr. Pletz after that?

A. Oh, yes, I saw him.

Q. Did you keep any office log as to who came and went out of your office?

A. No, I keep no diary.

Q. So you couldn't tell us the dates or the times you did see him after the time you saw him up there in the Corbett Building, in that attorney's office?

A. No, and I don't know when I saw him there, except it was while I was handling this particular case and it was prior to September 17th, 1936.

Q. You are satisfied it was during the year 1936?

A. Yes.

Q. You are sure of that date?

A. Yes. I place that by the claim I was handling?

Q. You recall that very definitely.

A. I recall I was over on that claim and that is how I fix the time.

(Testimony of David C. Pickett.)

Q. Now, as a matter not of my own inquisitiveness, but as a matter of the record, could you state who the man was?

A. I could tell you if you want it in the record.

Q. I feel it should be there. [161]

A. Hjalmar Hjerling, against the S. S. "Quinault" and his accident occurred April 3, 1935.

Q. Now in that particular you recollect the time that you saw Mr. Pletz there in the office, from that case?

A. Yes.

Q. And how many times would you say that you saw Gus after that?

A. I wouldn't attempt to estimate it, Bill, but I saw him quite a number of times.

Q. He come to your office practically every week, didn't he?

A. Oh, every week or two, and sometimes he would come up every week and sometimes he would delay quite a while between.

Q. And every time he came up there you talked to him personally, or did you let someone else talk to him?

A. I talked to him every time I was there, but I couldn't say if he come in when I wasn't there, I couldn't tell you.

Q. But you would say you talked to him at least twice a month?

A. Yes, my idea would be that it was oftener than that.

(Testimony of David C. Pickett.)

Q. And at each of these times did you offer him compensation?

A. I wouldn't say that I did every time. I made the [162] definite offer to him very early in the case that I would pay him his compensation any time he wanted to take it, and if there was any dispute on the rate of compensation that that could be checked up, or even determined by Mr. Marshall, if he was entitled to more than I paid him that Mr. Marshall would see that he got it. And I advised him to go up and see Mr. Marshall and he told me that he did go up and see Mr. Marshall. That was very early in the handling of the case, and I told him that I made that offer and that he could take it any time he wanted to, and frequently during these conversations, I urged him to take the compensation. But I wouldn't say I urged him to every time he was up there.

Q. You knew this, of course, that he had had a case in my office prior to this accident, didn't you?

A. No, I didn't know that. I didn't recall that.

Q. You knew that, didn't you?

A. No, I don't keep track of your clients.

Q. You knew he had been a client of mine?

A. No, I didn't.

Q. Why didn't you tell him to go and see a lawyer, or to go back over to Green's office, when he kept coming in and harassing you? Why not let us lawyers earn a livelihood around here, earn our wages or our keep.

A. Well, I tell you, Bill, several times in our conversations I told him if he was in doubt as to his rights he ought [163] to go to a lawyer. But after I was satisfied he had talked to a lawyer, I didn't say anything.

Q. You told him to go and see Mr. Marshall?

A. Yes, I told him to go and see Mr. Marshall. But also when we talked about what he wanted, I also suggested that he see a lawyer. I felt that a lawyer would straighten him out on what his demands were, when he was demanding more than our total liability, but I didn't suggest any one lawyer. They might double up on me, the others might.

Q. Now the fact of the matter is, he kept coming over there after you knew that he did have a lawyer, didn't he?

A. Yes, sir.

Q. And he came there for at least twice a month for a long period of time afterward?

A. Yes, sir.

Q. And at none of those times did you just simply tell him—now I am through.

A. No, I never tell them that.

Q. You knew, as far as you were concerned, you knew that the decisions had directly held the contrary to the theory that had been advanced in Mr. Green's office, didn't you?

A. Well, I thought their theory of the law was wrong.

Q. You knew that had been judicially so established, did you not, by the Appellate Court of the United States?

(Testimony of David C. Pickett.)

A. I thought the decisions were against their theory of [164] the law, yes.

Q. And yet all this time you allowed this man to come back there and talk lump sum settlement with you, didn't you?

A. Yes, I let him come back and talk a lump sum settlement, I didn't know how to stop it. I never do refuse to see these people when they come in. I see them, yes, why wouldn't I? And it is not unusual for these claimants to come and discuss the settlements with me, who are under contract with the lawyers. Frequently your clients come in and see me and you know about it, and frequently Mr. Green's clients come in to see me, and it is not an unusual thing for a client to come in and see me when he is under contract with a lawyer and I knew he was.

Q. But here you knew there was a definite sum of money that was payable to this man under certain rigid requirements, didn't you?

A. I knew that there was a limit of our liability. I didn't know he was entitled to that much money, no.

Q. And you knew as a matter of fact you had no possible authority to give him a lump sum settlement, you knew that the case was not a third party case, because he was employed upon the ship's account, or the stevedore, and you knew that nobody could give him a lump sum settlement except upon very substantial proof back in Washington, and be-

(Testimony of David C. Pickett.)

fore the United States Compensation Commission, didn't you?

A. I explained all that to Mr. Pletz. I knew it and I [165] explained it to Mr. Pletz.

Q. And yet you let him talk to you about it?

A. Certainly I let him talk to me about it. When he would make those demands I couldn't keep him from talking to me about it.

Q. Couldn't you find out some way to keep from talking?

A. I never made any effort to stop him from coming up.

Q. He fixed the figure \$6,000 and you said that figure was more than the compensation that he would receive if he got the full maximum under the act, didn't you, you told him that?

A. Here is what I had in my mind, Bill: if you will let me explain that, that if he took compensation he would get according to our records, a little less than \$15 a week. If you would pay him the principal value of \$7500, it wouldn't be \$7500, it would bring it down close to the \$6,000 he was demanding. That is what I explained to Mr. Pletz. You see, by the time you make your deductions the principal value of \$7500 wouldn't be \$7500. I had it counted out, but it is only a little over \$6,000. That is my recollection and I told him that even if we could settle the claim that we wouldn't pay that much except on order of the Commissioner.

(Testimony of David C. Pickett.)

Q. Well, why did you discuss the matter with him at all, Dave, in face of the fact that you didn't have any authority [166] to do it? Even Mr. Marshall himself couldn't give a lump sum settlement of a case without the permission of the Employees' Compensation Commission.

A. Well, he come in and wanted that and I told him that I Couldn't pay it, and I explained to him the reasons why a lump sum settlement couldn't be made as he wanted, and why, if it could be made, I wouldn't recommend it to my people.

Q. And he was also asking at the same time for special medical care, too, wasn't he? A. Yes.

Q. And during all this time you didn't think he was disabled at all, did you?

A. No, I thought he could work.

Q. You thought he was still disabled?

A. No, I thought he could work.

Q. You thought he was still disabled?

A. No, I didn't think he was disabled because my doctors advised me that he wasn't. Now you have asked me, I would like to answer the question as to why I kept talking to him.

Q. I don't want you to feel there is anything personal about this.

A. No, there isn't. And I want the Deputy Commissioner to understand this: we have lots of people come in and make high demands and claim they are disabled, and if I just refused to see people who are making demands that are out of

(Testimony of David C. Pickett.)

[167] proportion there would be lots of settlements that I later make that I wouldn't make. I felt from our doctors that he could work and wasn't disabled and I had in mind, although we couldn't make the settlement that he wanted, that if he was able to work that he might get his figure down close to what he was entitled to, giving him the benefit of the doubt, and pay disability from the date of the accident, November 12th, and if he was able to work, then a lump sum settlement would be worked out upon a showing that he had recovered. That is not unusual and it has occurred many times, and I wouldn't stop him from coming in because there was always the possibility of his changing his position and our working out a settlement.

Q. So, Dave, now when was it that you thought his disability ceased? As I understand it, at the start you didn't think he was disabled for much over three or four weeks at the best, did you?

A. How many questions do you have, Bill?

Q. I want to get the date of that?

A. First report was, from three to six months disability.

Q. But I understood you from the start of this matter you didn't think he was disabled but for a short period of time?

A. According to that report, from six weeks to three months.

Q. Then you did know, you had been advised around in September, probably, or August of 1936,

(Testimony of David C. Pickett.)

that there was not any [168] disabling injury and he just as well go back to work?

A. Well, I had thought that for several months.

Q. With that in mind, why was it that you didn't file a controversial under this act?

A. He didn't make any claim, there wasn't any reason to file it.

Q. He was asking for \$6,000, that is some kind of a claim?

A. He wasn't asking for compensation, there was no reason for a controversial, as I understand it.

Q. You had medical reports that he was well, or could go back to work and he was coming around to your office and taking up your time and all that, now why wasn't it that you didn't give us a controversial?

A. Well, I didn't understand that there was a report controverting the claim due.

Mr. Lord: That is all.

Mr. Beckett: That is all.

(Witness Excused.)

(Hearing Concluded.)

[Endorsed]: Filed July 8, 1941. [169]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY
AT HEARING.

Pursuant to notice, this matter was heard before
Wm. A. Marshall, Deputy Commissioner, United
States - Employees' Compensation Commission at
Portland, Oregon, on the 16th day of June, 1939.

APPEARANCES:

WM. P. LORD,

For the Claimant

DAVID C. PICKETT and H. B. BECKETT

For the Employer and Insurance Carrier. [170]

MR. DAVID C. PICKETT,

having been duly sworn previously, resumed the
witness stand,

Further Cross Examination

Questions by Mr. Lord:

Q. Was there something more that you wanted
to say in this case, Mr. Pickett?

A. No, not unless Harry wanted to ask me some-
thing.

Mr. Beckett: No, I didn't want to ask you any-
thing.

The Witness: I rushed off in kind of a hurry
the other day, that was not planned, Bill.

The Commissioner: It was important, though.

The Witness: Yes, it was. I should have written
you a report on that, too, Mr. Marshall. There is

(Testimony of David C. Pickett.)

one question Bill asked me the last time I was on that I don't think the answer was complete in it.

Q. What is that?

A. That is what interest I had in the case from a medical standpoint or otherwise when Mr. Pletz refused compensation, or the statute of limitations had run. Now we do have an interest there that I think to clear the whole thing I think possibly should be explained.

Q. I don't quite understand what you refer to.

A. It is a question you asked.

Q. As to the payment of the doctor bills?

A. No, your question was: Why was I interested in the case when he had refused compensation, or after the statute [171] of limitations had run? We do have an interest to this extent that as soon as that accident occurred we are faced with three possible claims: one is a claim under the Longshoremen's and Harbor Workers' Act; the other is a possible third party claim; and the other is a possible suit against the employer in spite of the Act. Now it just happens that I represented the carriers that would have had to defend each one of those claims that he was presenting and he had determined to make a liability claim, and had been asking for a lump sum settlement, and if suit had been filed in either type of those liability claims I would have been involved in the defense of it. And therefore I was interested in the claim that he was pressing, and I was interested in the claim after the

(Testimony of David C. Pickett.)

statute had run, not maybe as a compensation claim, but as a liability claim. It was up to me to keep in touch with him as long as there was a danger of either of those claims being pressed.

Q. In other words, you figured there was a two year statute of limitations in respect to any claim he might make as to liability, either as a third party claim or as a direct claim against the McCormick Steamship Company?

A. There might be, yes, but at any rate we would have them to defend if he filed them.

Q. So that is why then you did continue to discuss it with him? [172]

A. I was bound to discuss it with him as long as he was pressing any type of claim against any insurance company I represented.

Q. And you kept on discussing it with him until the controversial was filed, didn't you?

A. Yes, and until he had settled upon one claim he was going to press, I thought he had settled upon the liability claim long before that. As a matter of fact, he told me so and then when he came in and filed the formal claim then he was presenting a claim for compensation.

Q. He tells me, Dave, that he had told you at the start that he didn't need to take compensation, that he had some money saved up, that he could go on for a while and that you said that would be all right, that you would have a lump sum settlement of it when you were ready to close his claim?

(Testimony of David C. Pickett.)

A. No, he told me that after I filed the controversy, then he told me and he testified that that was the reason he let it run, but he never mentioned it to me until after he had filed the formal claim and I had filed notice of controversy. It was some time after that that he outlined that factor that he had some money and he didn't need any money then and he thought he could get it any time, but he never told me that before.

Q. Well, the way he puts it to me is that when he came down to your office that you told him that the compensation was there for him, something came up about the amount of it, [173] that he at that time had been advised that there wasn't any third party claim and there wasn't any claim against anybody except against the insurance carrier, or claim under the Compensation Act. He claims that at that time you discussed with him the question of lump sum settlement. Do you recall anything about it, anything being said then about lump sum settlement?

A. No, I don't quite get your question, Bill.

Q. What I am getting at is: he said that at the first start of this proceeding that this question of lump sum settlement or a lump sum payment under the Compensation Act was discussed and even got so far that the amount of it being fixed at \$3,000.

A. \$3,000?

Q. Yes, and then he says the only sticker in the thing with him was that you wouldn't agree to the

(Testimony of David C. Pickett.)

demand that he made that he have continued medical care. He wanted to have medical care, he said, and be assured of that and that you wouldn't agree to that, wouldn't agree to that provision?

A. Well, after he had been asking for a lump sum settlement several months, now I can't say just when he first mentioned the lump sum settlement, I didn't mention it first and I wouldn't have even thought of a lump sum settlement in a case of this kind in the beginning, but after he had been mentioning it for several months and I told him that [174] a lump sum settlement was just impossible under the terms that he was asking it, he did, as he testified when he was in the last time and asked for \$3,000 plus permanent medical aid plus a job.

Q. That is it.

A. And I told him then that even if it was in shape that we could get a settlement that I couldn't consider a settlement where it left anything like furnishing a job open and that I just couldn't even consider it.

Q. Didn't he discuss with you at the start about getting a job outside of longshoreing, identified with either the dock or the office, light work?

A. Well, not in the way of a settlement, Bill. He had mentioned, wondered why I couldn't get him a job on the dock and he asked me for something he could do, but I told him I had no supervision over furnishing jobs on the dock. The insurance company would pay the compensation or if

(Testimony of David C. Pickett.)

there was a third party claim and they made a settlement, they would make the settlement, but they couldn't take upon their shoulders the matter of furnishing jobs. We just couldn't do that. He mentioned a job, but he only mentioned it in the nature of a settlement several months after we had been discussing a settlement. Then it was \$3,000, plus a job, plus permanent medical aid. But that wasn't at the beginning at all nor did he mention a job at the beginning, it run along [175] quite a while before he mentioned the job.

Q. That is what I understood. He tells me he did talk to you about getting some light work down there, and a money settlement, and he said the main thing that kept the claim alive was the fact that you never could give him any assurance about the medical care you would give.

A. No, I think his testimony is right on that, that he wanted a job, \$3,000, and permanent medical aid, and I told him that I couldn't under any circumstances make the settlement where we left anything open like furnishing a job, that when we made a settlement it had to be final.

Q. As far as your firm was concerned, Rafferty & Pickett, you were not attorneys for the McCormick Steamship Company?

A. As far as these claims are concerned, we are attorneys for them.

Q. As far as these claims are concerned?

A. We are not their general attorneys.

(Testimony of David C. Pickett.)

Q. No, you are not their general attorneys, the general attorneys in town here are apparently Mr. Beckett—

A. Yes, Mr. Beckett. I had no jurisdiction over the employer down there for furnishing a job, but his request for a job was coupled with a settlement for \$3,000 and permanent medical aid and I never even considered it. More than that, there still remained the proposition that it wasn't the type of claim that we could settle. That was always staring us in [176] the face, that it wasn't the type of claim we could settle.

The Commissioner: You mean under the Longshoremens' Act?

A. Yes, under the Longshoremens' Act.

Q. There have been certain cases that you and I know about where the parties have made a sort of a phony third party claim, there have been settlements, haven't there?

A. There has to be an actual third party claim made, though.

Q. Yes, I understand, but he probably knew about—wasn't there a fellow named Wanerby that had a third party claim?

A. I never had anything to do with that.

Q. One that Mr. Illidge had?

A. Well, I didn't have it.

Q. No, you didn't have it. A. No.

Q. Now, however, he did come right along and talk to you about this?

(Testimony of David C. Pickett.)

A. The other side of that, Bill, is that he always told me there was nothing he could do, that he was totally disabled.

Q. Another thing I wanted to ask you about, did he at any time tell you before the expiration of the year that he didn't need any lawyer to handle the claim? [177] A. No.

Q. That he knew men who had gone up before Mr. Marshall and had had "an impartial arbitrator" as he put it, and he didn't need any lawyer to protect his claim?

A. No, he never discussed that, but his discussions and conversations always led me to believe that he had a lawyer, and his testimony showed that he saw a lawyer between the time that he was in the hospital the first time and the second time. He and I discussed the fact that I was attorney for the insurance company and when I would urge that he could work, and I didn't think he was disabled, and the doctor said he wasn't and he had said several times that was simply because I was attorney for the insurance company and wasn't looking out for his interests, and didn't care about his interests and he let me know that he had an attorney.

Q. He didn't tell you he didn't need one?

A. No.

Q. That he had been told by an attorney that he didn't need an attorney?

A. No, he didn't tell me that.

(Testimony of David C. Pickett.)

Q. At no time?

A. Let me get that.

Q. At no time did he tell you he didn't need an attorney, that if he had any controversy about his compensation to come up here to Mr. Marshall and Mr. Marshall would take the matter [178] up?

A. No, no, he didn't discuss settling before Mr. Marshall his conversations to me always every time he was up there could be summed up in that he wanted a settlement, and I had better get a settlement if I wanted to save myself trouble. Now there was a kind of a covert threat there, I don't mean personally against me, as though the results would be disastrous to us if we didn't settle with him. And I tried to find out what he meant and what he had in mind, but I never could get him to really explain it to me, except that he knew what he was doing.

Q. Well, you knew he had been hurt on the beach before, didn't you?

A. No.

Q. Didn't you look that up?

A. No.

Q. Didn't you know he had had a claim before?

A. No, I didn't know he had had a claim before.

Q. You heard he had had a claim when he was working on the river boats?

A. No. Was that a liability claim against a river boat?

Q. Yes.

A. I check up some of your claims, Bill, but I didn't check up this one.

(Testimony of David C. Pickett.)

Q. Well, you ought to at least tell me when one is slip- [179] ping away from me, Dave; that is fair, you knew that, didn't you?

A. What do you say?

Q. I say you knew that, didn't you?

A. You have been crowding me on this proposition that you were his attorney, and I am going to tell you a little more conversation I had with Mr. Pletz. I got called down very severely by Mr. Pletz after the notice of hearing came out and your name appeared on the notice. He wanted to know how you happened to be in there.

Q. He did?

A. Yes, sir, that he didn't intend to have you, that he evidently had, somebody else that he was going to have. That is what he told me and he asked me about that and I looked it up on the notice and I still don't find your name on it, and it makes me think that the envelope that it went to Mr. Marshall in was probably mailed out of your office, otherwise, Mr. Marshall wouldn't have had your name on it. I can't find your name on the notice, I looked it up yesterday and if it was there, I missed it.

Q. Well, maybe I got a lawsuit that I wasn't intended to have? A. I think you did,

Q. That might be interesting to some people. Not that I don't think that you are— [180]

A. And that is the reason I think that Mr. Pletz came up and saw Mr. Marshall twice, because he didn't know what to do about it, and so I sug-

(Testimony of David C. Pickett.)

gested if he was not satisfied to come up and see Mr. Marshall, or to go back to whatever attorney he had.

(The Commissioner turning through the original file.)

Mr. Lord: What is that?

The Commissioner: A letter from Mr. Lord.

The Witness: Can I see it?

The Commissioner: Yes, surely, these are all public records.

(The parties examine the document.)

The Witness: That was after the hearing, after the notices had gone out. But what he was complaining about was that the notice was sent to Mr. Lord in the first place. The only explanation I could see by looking it over was that it must have been mailed out in your envelope. He must have gone over to Mr. Lord's office and got the envelope and mailed it out.

Mr. Lord: I figured into it by first telling this man just exactly what the situation was. That is my typewriter, I wrote this out, didn't I, Gus?

The Claimant: No, you didn't write it out.

The Witness: I asked Miss Anderson, she is not [181] sure whether she wrote it.

Mr. Lord: That is right, she didn't write it, that is right, he testified formerly.

The Witness: I told her to get all the information for him and it was satisfactory with me if he did fill it out.

(Testimony of David C. Pickett.)

Q. Now you shot that broadside at me, have you anything more that you have tucked away that you haven't exploded yet?

A. No, I wouldn't have said that only you kept crowding me, because you seemed to think I should have known he was your client.

Q. No, I was just trying to find out if he hadn't told you that he had seen a lawyer and that the lawyer had told him that he didn't need a lawyer, that all he needed to do was to present—

A. No.

Q. To present any matters he had to Mr. Marshall directly?

A. No, he never discussed with me the matter of settling this before Mr. Marshall. I urged him to go and see Mr. Marshall but he didn't discuss about settling it before Mr. Marshall after the first few visits when he discussed the rate of compensation and after that his discussions were urging me to try to work out some kind of lump sum settlement.

Q. Dave, how often would you say he came up to see you after the first of the year, after the accident?

A. You mean after he was out March 19, 1936?
[182]

A. It would be hard to say, but he came up very often.

Q. And at none of those times did he ever ask you for the compensation check?

A. No, he would always refuse them.

(Testimony of David C. Pickett.)

Q. Well, would you always offer them to him?

A. I don't know that I offered them to him every time he was up there, Bill, I wouldn't say that, I know during the discussions when I would tell him that I couldn't make the settlement I would frequently urge him to take the compensation. I even went so far as to find out what his idea was as to what compensation he ought to get. I asked him if he would take \$18, \$20 and \$25, and he apparently wasn't satisfied with any of those, all he had in mind was a liability settlement at all times.

Q. Well, that translated itself into what has been termed a lump sum settlement here.

A. Well, it is more than that, Bill, because the settlement that he wanted was outside the Act.

Q. Yes, that is what I mean to say, he wanted a piece of money, one piece of money in cash, in other words?

A. This word lump sum settlement isn't a fair interpretation of what he wanted, or describe what he wanted.

Q. But the matter was discussed at numerous times after March, 1936, wasn't it, in your office with him?

A. Yes. [183]

Q. And at any time did you ever get him out the Act and show him that the only way a one-piece settlement of money could be paid to him in full was through application direct to the Deputy Commissioner and then to be approved by the Commission?

(Testimony of David C. Pickett.)

A. I don't think I ever took the Act and explained it, I explained the substance of it, but I wouldn't say that I ever had the act there.

Q. You never told him to make application for that to the Deputy Commissioner?

A. Application for—

Q. Application for a lump sum settlement, if he wanted to get it?

A. No, no, I did tell him however that it was my understanding that under the Act, before he could get a lump sum settlement that he would have to have his disability determined. I think that is Mr. Marshall's policy.

The Commissioner: Well, of course that is true, he wouldn't even have a basis for making application for a lump sum settlement if the disability wasn't determined, as to the disability and its character, that is whether it is temporary total disability, or permanent partial disability, or what the disability consisted of.

The Witness: But he gave me to understand that his claim was not limited by his rights under the Act, that [184] wasn't what he was making demand for.

Q. Nobody else ever made any demand on you but himself? A. No.

Q. That is no friend in his behalf?

A. I never discussed the claim with anybody but Mr. Pletz, unless you could say the one discussion that I had with that firm of lawyers was a discussion

(Testimony of David C. Pickett.)

of it, but Mr. Pletz' name was not mentioned at all. There is one thing that I want to call to Mr. Marshall's attention, and if I could see my testimony last time, there is a slight error in the testimony, Mr. Marshall and I together made an error.

Q. Whereabouts is this error?

A. It was where I said that Mr. Pletz came to me in June. Mr. Marshall spoke up and said "You mean in August?" and I said "Yes". And that is on page five. I said "About the latter part of June he came to my office, he wanted to be treated by a chiropractor by the name of Dr. Firth.

"The Commissioner: That was in August.

"A. Yes, that was in August." That is a mistake, I should have said: No, it was in June, because the treatments were, according to Dr. Firth's testimony were in June and July and it was in the latter part of June when he came in to see me about it. That is the only—I just said "Yes" without thinking, I guess.

Mr. Lord: Well, as far as I am concerned, I think [185] I am through examining Mr. Pickett. I would like to ask Mr. Pletz a question or two on this matter. I don't want to make this thing one of those serials, or anything that way.

(Witness excused.)

MR. GUS PLETZ,

the claimant, having been previously duly sworn resumes the witness stand;

Further Direct Examination

Questions by Mr. Lord:

Q. Gus, did you ever ask Mr. Pickett to get a job down on the McCormick dock or in their office, or any work outside of longshoring?

A. Yes.

Q. When was that?

A. It was the first time that we,—it was about eight or nine months after I got hurt and even later on than that. He always was talking about a job, he even went that far, "I couldn't get you any out there, but I have quite influential people and I might get you a job." And he asked me how much I would work for and I said that I needed at least twenty or twenty-five dollars a week, and he took my phone number down and my address down, but he never did, I never did hear anything.

Q. Why did you feel that Mr. Pickett should get you a [186] job, Gus?

A. Well, I would want to do something. At first I asked him about the \$3,000, that was the first time that we talked about it, the very first time I come up there and then he offered me the compensation and I told him that it wasn't enough and "I have a little money", and he said "Well, of course" he said, "I have to pay you the compensation but I would better like to settle with you later on." That

(Testimony of Gus Pletz.)

was the first time he told me that. I just let it go on. We didn't mention any settlement or nothing for quite a while and then later on he started in "What I want?" I told him "I am more interested to have a job and medical care" and so I told him \$3,000 and if he could get me a job on the McCormick and Mr. Pickett told me, he says "You can't ask for a thousand dollars or five hundred dollars with a job and medical care" he says "I won't do it" he says "It just has to be a money question" and then I made him the proposition \$6,000 and doctor care, but we always stuck on the doctor care, and the next thing I made him an offer of \$6,000 and he should deposit \$1,500 for doctor's care for me until I am well. I didn't say permanent until I am able to go to work and I would be glad and willing to go to work.

Q. Was there anything said to you about that you might get a job down there on the McCormick dock?

A. No, he told me that right away, that it is out of his [187] jurisdiction to get a job there for me, but it is like I says, he might get me a job somewhere under some other outfit because he says he knows lots of people, and he asked me how much I would work for and I told him \$20 to \$25 a week, and he told me he couldn't do it on the McCormick, he says that was out of his jurisdiction.

Q. Did you ever talk to him about having seen an attorney?

A. Yes.

(Testimony of Gus Pletz.)

Q. When was that first?

A. Oh, about five or six months after I got hurt. You see I was up to Green's office, I was only up there once and they told me they try to break that marine compensation law and I says "I don't know, I don't want to do anything" and I just asked them, and I didn't go up there any more. And I told Mr. Pickett what they was saying then. And Mr. Pickett says he has got lots of friends and he says that he would get along fine on the waterfront and he made settlements with them and he says "We come to a satisfactory agreement, too."

Q. Did you at any time ever talk to him about coming up and seeing the Deputy Commissioner when he was holding hearings here in town?

A. No, the first time Mr. Pickett mentioned Mr. Marshall to me it was that day when I asked him for the compensation [188] and then Mr. Pickett mentioned Mr. Marshall, that I have to fill out a formal claim and send it to him. That is the only time he mentioned Mr. Marshall.

Q. And did you do that then?

A. Yes, the girl in Mr. Pickett's office wrote out a claim for me.

Mr. Lord: And this is the one, Mr. Marshall?
(Indicating a document in the original file.)

The Commissioner: Yes, this is the one.

Mr. Pickett: That has been introduced in evidence?

Mr. Lord: Yes, I think so.

(Testimony of Gus Plets.)

Q. Look at it, Gus, is that the one that was made out there in their office?

A. Yes, that is the one that was made out in their office.

Q. And where did you mail that from, Gus?

A. I mailed it from Mr. Pickett's—well, I went out in the hall and dropped it in the mail-box.

Q. Did he give you the stamp to mail it with?

A. Yes.

Mr. Beckett: I thought you mailed it?

Mr. Lord: I thought so probably, too, but I guess I didn't.

Q. Well then, when was it Gus you came to see me about it? [189]

A. Well, I saw you after I got this first notice for the first hearing, I went up then in Mr. Green's office and asked him and Mr. Pickett come in, I asked him, I couldn't quite understand how you was on that hearing, I thought I didn't need no attorney, so that is the only time I saw Mr. Pickett in Mr. Green's office and I talked to him about that.

Q. We will get at this other proposition, when you said you didn't need an attorney, when did you find that out?

A. After I got that letter.

Q. Which letter is that?

A. About that first hearing.

Q. This brown one? (Indicating)

A. Yes.

Q. Where did you go to after you got that?

(Testimony of Gus Pletz.)

A. Well, I went to Mr. Green's office and I talked to him and then I went to your office and of course I know my wife, she was sick then, she was going to have a baby and she couldn't work and I know you would furnish me a little money that we could make it, so I just decided to let you have it.

Q. Well, I have been your attorney before, haven't I Gus? A. Yes.

A. And a long time before? A. Yes. [190]

Q. And then I saw you two up at the hospital, didn't I?

A. Yes, you saw me up to the hospital, and I met you several times down town and I went up with you once to the Court House.

Q. And what did I tell you?

A. You told me "There is no third party claim" and you said any time I want you to do something for me—I kind of think even if I need an attorney I get you, you see, but I didn't have no attorney whatsoever, and I was just over in Pickett's office once, and even a friend of mine, Fred Spalding, went over there before I could get over there.

Cross Examination,

Questions by Mr. Beckett:

Q. When were these times you talked to Mr. Lord, you said you saw him several times?

A. Yes.

The Commissioner: At the hospital once.

Mr. Beckett: At the hospital?

Mr. Pickett: He said several times.

(Testimony of Gus Plets.)

The Commissioner: At the hospital and several times on the street and once going to the Court House.

Mr. Pickett: That is right.

Q. (Mr. Beckett) That was before the year, was it before the year had passed?

A. Yes, yes, it was after I was hurt, it was in that [191] year.

Mr. Lord: Well then even after you first talked to me, when I first talked to you, Gus, did I tell you you didn't need a lawyer or not? What did I tell you about that?

The Claimant: Well——

Mr. Beckett: When was the first time you saw Mr. Lord?

The Claimant: Well, yes, he had told me I need an attorney, but I thought I didn't.

Mr. Lord: Now that was after the year had expired that I told you that, wasn't it?

The Claimant: Yes.

Mr. Lord: Well, when I first saw you, you remember I was up to see somebody at the hospital and I saw you laying on the bed there?

The Claimant: Yes.

Mr. Lord: What did I tell you that time?

The Claimant: Well, about the third party claim.

Q. (Mr. Beckett) What did you say?

A. There was no third party claim and you told me that you was willing that I should come up to

(Testimony of Gus Pleza.)

your office if I don't get it straightened out with them.

Q. Well, didn't he tell you to take compensation, didn't Mr. Lord tell you the first time?

The Commissioner: At the hospital you mean?

[192]

Q. Didn't he tell you to take compensation as there wasn't any third party claim?

A. No, that was later on. That was later on when I went up with him to the Court House.

Q. That was later on he told you up at the Court House to take compensation?

A. He said there is no third party claim, I should take the compensation, yes.

Q. When was that?

A. Oh, that was seven or eight months after I got hurt.

Q. Didn't he tell you the same thing at the hospital that you didn't need an attorney and that you should take compensation at the hospital?

A. I don't think it was even mentioned yet. The only time we talked about the compensation—Of course he told me on the street that time that there is no third party claim whatever and that I should take compensation, yes.

Q. He told you on the street, too?

A. Yes, not in the hospital. He asked me how I was and if he could do something for me I should come up and see him.

Q. He had been your attorney before?

(Testimony of Gus Plets.)

A. Yes.

Q. He is the only attorney you have ever had up to that time? A. Yes. [193]

Q. Well then he told you on two or three—Mr. Lord told you on two or three occasions you should take compensation? A. No, only once.

Q. You said once at the Court House and once on the street?

A. Well, that was on the street. I went up with him to the Court House, I met him on the street and I went with Mr. Lord up to the Court House.

Q. But you are sure he didn't tell you that in the hospital?

A. Yes, I am quite sure, because I was pretty sick, I didn't want to see anybody. The same thing with Mr. Gray, he come up there and I couldn't hardly talk and he wants to have a statement from me.

Mr. Beckett: I interrupted you?

Mr. Lord: No, I was all through, I couldn't think of anything more to say or to ask.

The Claimant: And I went to see Mr. Pickett, he did give me personal loans from him.

Mr. Pickett: That is, out of my own money?

The Claimant: Yes.

Mr. Pickett: To help pay your rent so that you wouldn't be put out?

The Claimant: Yes, rent and once Christmas, and my wife she was sick and he did let me have some money from him. [194]

(Testimony of Gus Pletz.)

Mr. Pickett: That was understood definitely between us it was my personal money.

Mr. Lord: Yes, I will stipulate that it was.

Mr. Pickett: And that has nothing to do with the issue in this case.

Mr. Lord: No, the fact is that he did loan him money; it wasn't the company's money, I will stipulate to that. Anything further?

Mr. Pickett: There is an inaccuracy in my testimony I would like to clear up.

The Claimant: Dr. Wilford Belknap he did treat me for quite a while, too, I was having trouble with my head.

Mr. Pickett: I was misled by the testimony of Mr. Gray and Mr. Pletz that the statement of Mr. Pletz was not signed until about two weeks afterwards, but in checking over the file I think the statement is dated November 15th which would be when he was up there the first time, and then he went back afterward with the check. I would like that inaccuracy in my testimony corrected.

The Commissioner: Page four.

Mr. Pickett: It run all through this testimony that Mr. Gray was up there the second time, and I don't know where it is. Where is my testimony?

The Commissioner: Page four.

Mr. Pickett: The other day when I testified—

(Testimony of Gus Plets.)

Mr. Lord: I think his testimony would probably show the date, Mr. Firth's testimony would probably show the date.

Mr. Pickett: I don't mean Mr. Firth's testimony. When Mr. Gray went up to get the statement, I said that Mr. Gray did not get the statement the first time, but I find the statement was dated November 15th, so he must have got the statement the first time, and his testimony was that he thought he was up there twice.

The Claimant: He was up there twice.

Mr. Pickett: He was, and he got the statement the first time. I don't find it in my testimony.

The Claimant: It was the second day, I think, or the third day he was up there. I was in the hospital, I always—I did have terrible trouble with my head and that is why Dr. Belknap, Wilford Belknap treated me.

Mr. Pickett: I think you introduced the statement.

Mr. Lord: Yes, we introduced the statement, I recall very distinctly that that was taken there.

Mr. Pickett: Here is where you introduced it, oh, here it is, on page 23 of the testimony, taken on July 23rd, 1937, is the statement of Gus Plets, signed, Portland, Oregon November 15, 1935. It shows that the statement was signed November 15th. That was the day Mr. Gray went up the first time, and we had been misled in thinking that he

(Testimony of Gus Pletz.)

took the statement when he went back and took the check on November [196] 26th.

The Claimant: No, he offered me the check the first time.

Mr. Pickett: The check was offered on November 26th.

The Claimant: No, the first time he did it.

Mr. Pickett: Well, all I can say is that our records show it was made out and that the copy of the draft went forward on November 26th, and the notation shows it was taken up on the 26th and refused. There is a notation written out to that effect. That is all I know about it. And there is one other inaccuracy in the testimony, in checking it over I want to correct, and that is, Mr. Lord asked me if I had sent Mr. Pletz to any doctor after the year had expired and I find by checking it I sent him to one doctor, Dr. McClure, and I want to make that correction.

Mr. Lord: Do you know what date that was?

The Claimant: Well, I went to many doctors.

Mr. Pickett: Yes, he went to many doctors, but that was the only one after the year expired, as far as I can determine.

Mr. Lord: That is the only other doctor outside of Dr. Belknap. You let him go to Dr. Belknap.

A. The year expired.

Mr. Pickett: He went to Dr. Belknap and Dr. Belknap since September or about September of 1936 has been carrying [197] that along upon my—

(Testimony of Gus Plets.)

when I called him and told him that I didn't know that I was liable under the Act, I really didn't know what my responsibility was, and he agreed to carry that as he does other liability claims and other claims where they refuse compensation, and instead of automatic medical coverage, let it go until the case is settled. I might add that the agreement with Dr. Belknap is that everything he has done since that time in September he has done upon his own responsibility.

Mr. Beckett: You mean, "by his own responsibility", you explained to him that he was not looking to you definitely for compensation.

Mr. Pickett: Yes, that he was not looking to me for compensation.

Mr. Lord: Did you tell Gus that, that the attention he was getting was not being rendered under the Act?

Mr. Pickett: I didn't tell him, I understood that Dr. Belknap did not intend to press the claim against Gus. He wasn't going to look to Gus, but I don't recall that I told Gus.

Mr. Lord: In other words, Gus kept on going to, —you knew that Gus had kept on going to Dr. Belknap but you didn't tell him anything about the fact that the treatments he was getting were not being rendered under the provisions of the Act requiring the employer to furnish medical care?

(Testimony of Gus Pletz.)

Mr. Pickett: No, I never, I don't recall telling him.

Mr. Lord: You don't think there is any other doctor you sent him to after September outside of Dr. Belknap with the exception of Dr. McClure?

Mr. Pickett: That is the only one, I am sure.

Mr. Lord: How about that, Gus, do you recall going to any other doctor?

The Claimant: I don't know, it is such a long time, I can't recollect everything.

Mr. Pickett: I am sure all of the other doctors were before the year expired.

Mr. Lord: When was it that you went to this neurologist, Dr. Goldsmith?

The Claimant: Oh, it was in that year.

Mr. Lord: All within the year after you got hurt?

Mr. Pickett: I wasn't think about the year and measuring my actions by the year.

Mr. Lord: No, I appreciate you were not thinking about it at all.

The Claimant: I don't know if it was the same year or after the year, I don't know. I have been to so many doctors I can't remember.

Mr. Lord: Well, what doctors have you been to, Gus, now? [199]

The Claimant: Dr. Belknap treated me most and Dr. Wilford Belknap, he treated me, I would complain of my head all the time in the hospital and Dr. Wilford Belknap he did treat me for quite a

(Testimony of Gus Pletz.)

while, too, and then after a while I went to Dr. Goldsmith.

Mr. Lord: Anybody else?

The Claimant: Well, those doctors did treat me, and I have been for examinations to Dr. McClure, Dr. Wise in Dr. Belknap's office examined me.

Mr. Lord: And what about Dr. Blair.

The Claimant: Yes, he suggested, he sent in a report of an operation. When I was out the first time I could hardly get around at all, I couldn't get on the sidewalk with this right leg and I went up to Mr. Pickett and told him something had to be done, instead of getting better I got worse, and then he sent me to Dr. Blair.

Mr. Lord: And when was that, what date was it?

The Claimant: Oh, I don't know the date, but it was before I went the second time back to the hospital.

Mr. Lord: I see, That is all.

Mr. Pickett: If you want to know when he went to Dr. Blair I have it.

Mr. Lord: Give the date, what year?

Mr. Pickett: February 6, 1936.

(Witness Excused.)

(Hearing Concluded.)

[Endorsed]: Filed July 8, 1941. [200]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employee's Compensation Commission, at Portland, Oregon, on the 23d day of July, 1937.

APPEARANCES:

WM. P. LORD

For the Claimant

DAVID C. PICKETT and WENDELL GRAY

For the Employer and insurance carrier. [201]

Mr. Pickett: Just a minute, at this time I would like to raise a point of law on this case, that this accident occurred November 12th, 1935; no payment of compensation was made, and none was accepted; no election to pursue a remedy against a third party was filed with the Deputy Commissioner, and no formal claim for compensation was filed until more than one year after the date of the accident, and that the claim by virtue of that is barred by the statute of limitations.

Mr. Lord: Now, why don't you give us the date the claim was filed.

Mr. Pickett: I don't have it, Bill, or I would.

Mr. Lord: I suppose we might put that in, that is, the time that a formal claim was filed.

Mr. Pickett: I don't have the date that a formal claim was filed.

The Commissioner: As far as my file is concerned, the formal claim was dated April 19th, 1937, and was received in our office the next day or April 20th, 1937.

Mr. G. PLETZ,

the claimant, called as a witness in his own behalf, having been first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination,

Questions by Mr. Lord:

Q. Mr. Pletz, you are a longshoreman and maritime worker by occupation, are you not?

A. Yes.

Q. And you received an injury while employed as a longshoreman, did you? [202]

A. Yes, sir.

Q. What date did you receive that injury?

A. The 12th of November.

Q. Of what year? A. 1935.

Q. And by whom were you employed at the time? A. McCormick Steamship Company.

Q. And were you on a steamship at the time?

A. Yes, I was on a steamship.

Q. And do you recall the name of the steamship?

A. "West Planter".

Q. Just exactly what happened to you, not in any detail?

A. I worked on the inshore side of the lower hold, and they sent in steel drums on boards.

Mr. Pickett: Those were oil containers.

(Testimony of Gus Pletz.)

A. It was vegetable drums, I think, and I was working right under the hatch combing, and when they sent in a load from the offshore side, some of the steel drums fall down and one hit me right in the back of the hip.

Q. And were you hurt any place else, Gus?

A. No, just the back of the hip.

Q. Were you disabled from the moment you were injured? A. Yes.

Q. Was any aid, medical or surgical aid rendered you?

A. They took me out on a board and took me to the hospital.

Q. And took you to the hospital, is that what you said? A. Yes. [203]

Q. Who was it that did all this, the McCormick Steamship Company? A. Yes.

Q. And did they have their employees other than yourself working around there? A. Yes.

Q. Employees of the ship?

A. Well, there was just the,—no, not in the gang, there was no employees on the boat.

Q. Were any of the mates around watching the work?

A. The gang boss or the walking boss, yes.

Q. Who was that?

A. Charlie Rudberg. After I got hurt, they used the net slings for sending in the steel drums.

Q. How long were you in the hospital?

A. I was in the hospital until Christmas first.

Q. And what doctor looked after you?

(Testimony of Gus Pletz.)

A. Dr. Sabin attended me the first night, and after that Dr. Belknap took care of me.

Q. And you continued under their treatment after your release from the hospital?

A. Yes, I was out about six weeks, and then I went back again and then they operated on me at the hospital.

Q. Now you went back to the hospital at whose request?

A. Well, I went up to Dr. Blair for examination, and he recommended this operation, he suggested this operation.

Q. Did you go to Dr. Blair on your own responsibility, or [204] was that at the suggestion of somebody else?

A. No, Mr. Pickett sent me to him.

Q. Now, is that the same gentleman who sits here in the hearing?

A. Yes.

Q. And when was it you talked to Mr. Pickett?

A. I was up there about three weeks after I was out of the hospital, I think, the first time.

Q. And how long did you stay in the hospital, Gus?

A. I went in the 12th of February and stayed in until the 13th of March.

The Commissioner. That is the second time, you mean?

A. Yes.

Q. And after you were released in March, did you go back to the hospital again?

A. No.

(Testimony of Gus Pletz.)

Q. When you were released, Gus, were you able to resume any occupation? A. No.

Q. Were you feeling bad?

A. Yes, I was feeling bad always.

Q. Did you get hurt on your head in any way when you were injured?

A. No, I just got a hurt on the back.

Q. You feel you always had possession of your faculties so that you knew what you were doing and the business you were transacting? [205]

A. Yes.

Q. After you left the hospital, was any attention given you by the doctors, I am speaking now about the March 13th discharge? A. Yes.

Q. How long afterwards were you treated by the medical staff?

A. I am still going up there.

Q. You are still receiving treatment from their doctors? A. Yes.

Q. How recent was the last interview and treatment in any way you have had from their doctors?

A. I did get up there for quite a while three times a week, and now I go twice a week, and for a while I did have to go up there every day.

Q. And just generally what sort of treatment was given you?

A. The treatments that they gave me were injections in the arm.

Q. And have such injections been given you since the 20th of April, 1937? A. Yes.

(Testimony of Gus Pletz.)

Q. Now, Gus, during this period of time, have you made any money at any occupation?

A. No.

Q. And are you and have you been able to do any kind of labor? [206]

A. No.

Q. And at the present time do you feel physically able to resume any kind of occupation?

A. I feel pretty bad, but I could try to do something, but I don't think that I could.

Q. Do what?

A. I couldn't go back and do that kind of work.

Q. As I understand it, Gus, you have also been a sailor?

A. Yes.

Q. And worked here on the river in different capacities on river steamers?

A. Yes, I have worked on river steamers.

Q. Do you feel you could do that type of work if it wasn't too heavy?

A. No, I couldn't do that.

Q. Now, Gus, after you were injured, did you in any way report this accident to any of the McCormick Steamship Company employees?

A. Yes.

Q. Who was it?

A. No, not any of the steamship company employees, but Mr. Gray, he did come up to the hospital about three days after I get hurt, and I couldn't speak, so he said he come back in eight days later.

(Testimony of Gus Pletz.)

Q. Mr. Gray isn't here at the present time, is he, Mr. Pletz?

A. Yes, Mr. Gray is here. [207]

Q. Is he here? A. Yes.

Q. And he came up there to the hospital, did he?

A. Yes.

Q. And what I am getting at, Gus, is the time you were injured, did you talk to any of the, or see any of the McCormick Steamship Company employes,—I don't necessarily mean any of the mates or seamen on the ship, but I mean like Charlie and men of that kind around the dock? A. No.

Q. You had no discussion with them at all, or they didn't say anything to you?

A. No, but—

Q. But what?

A. But some other guy, he knew about it, and he asked him.

Q. Who are you talking about now?

A. Charlie Rudberg, he asked how I am getting along, and he was inquiring all the time about me in the hospital.

Q. He was? A. Yes.

Q. He came to the hospital?

A. No, he didn't come to the hospital, he didn't.

Mr. Pickett: You mean he inquired from others how you were getting along? A. Yes.

The Commissioner: Did he telephone, or what?

A. No, he saw a friend of mine, a man that

(Testimony of Gus Plets.)

worked on the [208] waterfront that worked with me.

The Commissioner: All right.

Q. And they told you that he was asking about you, did they? A. Yes.

Q. And what position does Charlie hold down there on the dock?

A. He is a walking boss for the company.

Q. Well, he is more or less of a superintendent, is he not?

A. Yes, he supervises the work there, in loading and discharging.

Q. Mr. Gray came to see you and who did he say he was representing?

A. He represented, well, the insurance company, he said, and the McCormick—— at first I didn't want to give him my report, and then he told me he had to report this case to the accident commission.

Q. Now, did you understand from Mr. Gray whether he was representing the McCormick Steamship Company or the owners of this boat, or was he representing the insurance carrier, the Fireman's Fund?

A. He told me he was from the insurance.

Q. And you say he said he would come back again in eight days? A. Yes.

Q. Now, what did he do about coming back again?

(Testimony of Gus Pletz.)

A. He did come back, and then he wrote it out, he asked me and he wrote it all down, and I signed it.

Q. In other words, you made one of these statements? [209] A. Yes.

Q. The company requires? A. Yes.

Q. About how the accident happened?

A. Yes.

Q. And what did he do, did he come back again?

A. No.

Q. Did he offer you a check? A. Yes.

Q. And was the check all made out?

A. Well, I don't know, he said, "I am very willing to advance you money if you need some, and I asked him how much he was going to get me, and he said fourteen dollars, and I don't know now whether it was forty cents or twenty cents.

Q. What did you say to him about that?

A. I said to him I didn't need any money right now, "I just want to get out of here."

Q. You knew you couldn't get out of there, didn't you?

A. No, no, but I said that I didn't need any money, when I was able to come out then we could talk things over, and so he gave me his card and when I was out I did go up to the office.

Q. And you went up to the office in what building? A. In the Mead Building.

Q. Was it in the Mead Building then, or the Title and Trust Building?

(Testimony of Gus Plets.)

A. No, I went up to Mr. Pickett's office.

Q. And was Mr. Pickett in? [210]

A. Yes.

Q. And did you get to see him? A. Yes.

Q. Or did you talk to some of the help around there? A. No, I saw him.

Q. And what did Mr. Pickett say?

A. Well, he was going to give me the compensation. "Well," I said, "I knowed that some guys get up to twenty dollars and so on, and I think that fourteen dollars was not enough."

Q. You knew the way in which they figured or computed the amount of compensation, did you?

A. Well, not at that time.

Q. What did Mr. Pickett say?

A. He said, no, that is all what he could give me, but Mr. Gray at that time in the office, he said, "Well, I can raise it a little bit."

Q. Had he told you how much he would raise it? A. No.

Q. He told you he would give you fourteen-twenty, or something like that?

A. Yes, he said he would give me fourteen-twenty or something like that, and I said, "My gosh, I made forty and fifty dollars a week, and now you come around here with fourteen dollars." "Well," he says, "when you come out we can talk things over and we might raise it a little bit."

Q. And is that the reason you went down to Mr. Pickett's office, to discuss matters? [211]

A. Yes.

(Testimony of Gus Pletz:)

Q. And then he said that he wouldn't pay you any more? A. No.

Q. Do you know what date that was?

A. No, but it was between before I went back to the hospital.

Q. That would be before March 13, 1936, then, wouldn't it?

A. It was from Christmas to February, 1936.

Q. Did you make repeated efforts to get your compensation re-fixed or not?

A. Yes, I tried to, and I was asking Mr. Pickett if he could get some kind of an agreement. I did need money, but I didn't want to let the doctor go. Mr. Pickett said he was willing, he would rather make a settlement with me than pay me the compensation.

Q. Now, by settlement, Gus.

A. Well, he was going to give me a lump sum, but it should be final.

Q. Final? A. Yes.

Q. And did Mr. Pickett tell you he couldn't do that?

A. No, he said himself he would better like to settle it than pay me compensation.

Q. Didn't say he couldn't pay you a settlement without Mr. Marshall's consent, or something that way? A. No. [221]

Q. And what did you do about that?

(Testimony of Gus Pletz.)

A. And I said I didn't want to do a final settlement, because I did need the doctors, and we didn't get to no agreement, see?

Q. You mean to say you didn't come to any conclusion about the amount, or that you didn't have any settlement at all, which was it?

A. Well, we didn't come to any agreement on account that I insisted to have doctor's care.

Q. In other words, you wanted a lump sum settlement and doctor's care?

A. Yes.

Q. And Mr. Pickett was not willing to give you the doctor's care?

A. No, that was his objection.

Q. Then what did you do?

A. Well, I just let it go along like that and—

Q. Did they offer you any more compensation checks in payment of the compensation that was due after this talk with Mr. Pickett between Christmas and February?

A. Yes, later on he did offer me that again, I talked with him again and he said again, "Why don't you take the compensation," and I said that it wasn't enough, and if they would give me a little more I would take it.

Q. You mean an increase over this fourteen dollars and some cents a month (week)?

A. Yes. [213]

Q. And he offered still to give you the fourteen something a month (week), and you wouldn't take it, is that it?

A. Yes, that is correct.

(Testimony of Gus Pletz.)

Q. Well, now, did they keep on offering it to you after you got in the hospital?

A. No, we didn't discuss it then until I got out again.

Q. And when you got out again, did you keep on discussing it with Mr. Pickett? A. Yes.

Q. During the year 1936, how often were you up to Mr. Pickett's office?

A. Oh, I think I was up there a dozen times, quite often.

Q. And each time did he offer you the compensation?

A. No, but it looked to me that he always would try to,—well, he was willing to settle, but he wasn't willing to give me the doctor's care.

Q. You mean to say it looked like he was willing to give you a lump sum settlement, but not medical care? A. Yes.

Q. In addition to the lump sum settlement?

A. Yes.

Q. And you wanted the medical care, did you?

A. Yes.

Q. And then what happened, Gus, did you keep on getting medical care and keep on talking to Mr. Pickett? A. Yes.

Q. And up until the present time you never have received [214] any compensation at all?

A. No.

Q. And then eventually, then in April you came to me?

(Testimony of Gus Plets.)

A. No, I did go up to Mr. Pickett, because I know that I would have a long time to go until I would be good, so I decided about two months before I sent in this report of the claim, I was asking Mr. Pickett that I had better take the compensation, because it will take a long time until I can work. And Mr. Pickett says, "You wait for a while, you might get a little better when it gets warmer." So I did let it go another couple of months, and then I did come up and insist that I wanted the compensation, and then Mr. Pickett told me I had to file a claim with Mr. Marshall.

Q. Now, when was this, Gus?

A. Well, it was about a day before I seen you.

Q. Did you send a claim in?

A. Yes, Mr. Pickett in the office fixed it up for me.

Q. Wait a second,—this claim that you really sent in was sent in by our office, was it not?

A. No, it was sent in by Mr. Pickett.

Mr. Lord: Is that right, Dave?

Mr. Pickett: It was made out for him by our girl and mailed by him.

Mr. Lord: I thought that was my office, Mr. Marshall, let me see that (indicating).

Mr. Pickett: I think at least I told him that our girl would make it out if he wanted me to. [215]

The Witness: Yes, you said that you would make it out if I wanted you to, and the girl did make it out.

(Testimony of Gus Pletz.)

Mr. Pickett: Didn't the girl make it out for you?

A. Yes, the girl made it out for me, you was in there, too.

Mr. Pickett: It is my recollection that that is right, I know I told you we would do it.

The Commissioner: That is a different date, that letter there, I was trying to see whether it had any relation to the claim (submitting a letter to Mr. Lord):

Mr. Lord: Do you mind if I go all through this (referring to the file)?

The Commissioner: Why, no.

Q. Is there anything else, Gus, that you want to explain here to the Commissioner about your claims?

A. Well, I never did know that I did have to file a claim with Mr. Marshall,—I even didn't thought I need a lawyer, and I told Mr. Pickett that I always tried to get along with him without using a lawyer at all.

The Commissioner: Didn't you discuss this matter of compensation with some of the boys during that long period of time?

A. Yes.

The Commissioner: What did they tell you?

A. They never did tell me anything.

The Commissioner: They never told you you had to file it with the Deputy Commissioner at all?

A. No.

(Testimony of Gus Pletz.)

Q. You have known me, Gus, a long, long time?

A. Yes.

The Commissioner: How long did you work as a longshoreman?

A. Since 1930, I worked first on the river boats, and then on the docks.

Mr. Lord: That is all.

Mr. Pickett: Before I begin the cross examination, I would like to have shown in the record from Mr. Marshall's record, that no election to pursue the remedy against a third party was filed.

Mr. Lord: We admit that no election to pursue a remedy against a third party was filed.

Cross Examination

Questions by Mr. Pickett:

Q. I saw you at various times when you came up there, didn't I, Mr. Pletz?

A. Yes, you saw me several times.

Q. And I asked you how you were going to proceed if you didn't take compensation?

A. No, you didn't told me a thing.

Q. And you told me that you would proceed, and that you had consulted others, and that you would consult somebody else, didn't you?

A. I did consult Mr. Green once for advice on my compensation, if I could take it.

Q. Yes.

The Commissioner: When did you consult Mr. Green? [217]

(Testimony of Gus Pletz.)

A. Oh, about a year ago.

The Commissioner: About a year ago?

A. Yes.

Q. And you threatened several times to bring suit against me, didn't you?

A. No, I didn't threaten to bring suit against you.

Q. Now, just tell the truth, Gus.

A. I said I try to get along with you.

Q. If I didn't do what you wanted me to, that then you would proceed against my company?

A. I didn't say that.

Q. And I told you then that you would not be able to do it?

A. Yes, you told me I would not be able to do it.

Q. And I told you that I was doubtful if you had a third-party remedy.

A. I knew there was no third party.

Q. And I told you you should take compensation?

A. Yes, you told me I should take compensation.

Q. And you refused to do it.

A. Yes, I refused to do it on account of my earnings, I knew I did not get the amount I am entitled to.

Q. And when you came in the first day and asked for your compensation, I asked you what you thought you were entitled to, and asked you to bring

(Testimony of Gus Pletz.)

in your earnings, that is what I asked you to do the first time?

A. No. You said, "Just wait, we will get a settlement, [218] wait until it gets warm and then we can settle."

Q. Months before that I told you that with the demands you were making that we couldn't reach a settlement, that I couldn't reach a settlement and give any medical aid after that.

A. You acknowledged that you wanted to settle with me, but it couldn't be with a doctor's medical aid after the settlement, that it would have to be a final one.

Q. And that the final settlement would have to be with Mr. Marshall's consent?

A. No, you never did mention Mr. Marshall to me at no time.

Q. Unless there was a third party claim.

A. I know there wasn't.

The Commissioner: When did you first become satisfied that you didn't have a third-party claim?

A. Well, I knowed it from the start.

Q. Were you advised you could bring a suit in spite of that?

A. I went up to Mr. Green and asked him if I could take my compensation, and he make me this proposition, he said, he asked for the details, and then he advised, he says, "It is a good case to try to break that marine compensation law."

Mr. Pickett: Yes, and that is what it was, too.

(Testimony of Gus Pletz.)

The Witness: But he says, "It takes time." Well, I told him that if he have the papers ready—

Mr. Lord: I don't see what that has to do with this case.

Mr. Pickett: I do, that is the theory he proceeded on. [219]

Mr. Lord: You waived your right to have a claim filed here, Mr. Pickett,—you should pay this man compensation.

Mr. Pickett: No.

The Witness: I didn't want to do that, I went to Mr. Pickett and told him about it.

Q. You never did tell me, this is the first time that you told me outright that you saw Green.

A. No, I never did tell you I saw Green.

Q. No, you never did tell me you saw Green.

A. But I told you that I went up there.

Q. But you told me you would bring a suit against me.

A. No, I didn't say that I could bring a suit against you, but I told you that that guy thinks I could.

Mr. Pickett: That is all.

Mr. Lord: That is all.

(Witness excused.)

MR. WENDELL GRAY

is called as a witness on behalf of claimant, and having been first duly sworn, was examined and testified as follows:

Direct Examination

Questions by Mr. Lord:

Q. Mr. Gray, you were employed in connection with this claim, as one of the attorneys, were you not?

A. I was employed by Mr. Pickett's office at that time, and the nature of my employment consisted of investigating these cases.

Q. You mean longshoremen's cases?

A. Yes, longshoremen's cases. [220]

Q. Now, in your investigating of these cases, you came across the case of Gus Pletz, I presume?

A. That is right.

Q. Did you receive a report from the McCormick Steamship Company's offices, reporting that an accident occurred to Gus Pletz?

A. Yes, we were notified, I believe.

Q. And after that notice was received, you made a report to the Deputy Commissioner at Seattle, did you?

A. I personally did not take care of that.

Q. That would not be part of your work?

A. No, that would not be.

Q. But you went to the hospital and interviewed Gus Pletz, did you not?

A. I did.

(Testimony of Wendell Gray.)

Q. And of course there were two purposes in that, one was to ascertain the nature of the injury, and also to ascertain whether it was a claim against a third party, is that correct?

A. Substantially so. I went there to secure the facts pertaining to the accident, and that would, of course, determine any third-party liability, at least it would go to help determine that. That is not the only reason that I went there.

Q. No, but I understand that is one of the reasons? A. Yes.

Q. The question of liability was an important question in this investigation? [221] A. Yes.

Q. And did you take a statement from Mr. Pletz? A. I did.

Q. You interviewed him as to how the accident happened? A. I did.

Q. And you took notes on it and you had Mr. Pletz sign the statement after you had read it to him? A. That is correct.

Q. And have you got the statement?

A. I believe he read it.

Q. Have you got the date the statement was taken?

A. I have, it was taken November 15th, 1935.

Q. Mr. Lord: Have you any objection to having the matter go into the record at this proceeding, Mr. Pickett?

Mr. Pickett: No.

Mr. Lord: If you boys want to keep the original, I can read it into the record.

(Testimony of Wendell Gray.)

Mr. Pickett: I think the original should go in.

Mr. Lord: I was going to read the original in.

Mr. Pickett: I will give you a copy of it, if it goes in I want it to go in as an exhibit.

The Commissioner: Yes, go in as an exhibit, sure.

Mr. Lord: I ask that it be marked "Claimant's Exhibit 1".

(Thereupon the statement referred to is received and filed in evidence and is marked

"CLAIMANT'S EXHIBIT 1",

and is [222] as follows:

"I, Gus Pletz, 1505 S. W. Mill, Portland, was employed November 12, 1935, as longshoreman to assist in loading general cargo onto the SS West Planter. I worked in P. Erskine's gang in No. 2 hold, port side. Eight men worked in the No. 2 hold. I do not know their names. A longshoreman operated No. 2 winches.

About 7 pm we were loading empty fifty gallon drums. I was working under the port hatch coaming at the bottom of the hold stowing empty drums when a slongload of six empty drums was lowered into the hold for the starboard side. As it was being lowered three of the drums fell off of the slingboard. I heard a shout of warning and tried to get out of the way, but one of the falling drums struck me in my back over my hips.

(Testimony of Wendell Gray.)

Five drums had been placed on the slingboards but the men on the dock started sending six drums on a slingboard. That was one drum too many and the spreader lines to each corner of the slingboard pressed against the drums when there were six on the board. It is my belief that the spreader lines crowded the three empty drums which fell off of the slingboard. The drums were stood on end on the slingboard.

The winches were working all right and the winch driver was handling the winches carefully and properly. The cause of the accident was due to placing one too many drums on the slingboard. That was the second load of six drums.

Portland, Oregon, November 15, 1935.

(Sgd) G. PLETZ." [223]

Q. After you took this statement, did you offer Mr. Pletz any compensation? A. I did.

Q. Did you have the compensation draft with you?

A. My memory is not clear as to the exact date I tendered him compensation. I believe that I tendered him compensation about ten days later. However, as I say, I tendered him compensation either at this time or at another time I called on Mr. Pletz, and I can't definitely state which, but the purpose in calling on Mr. Pletz at the hospital was

(Testimony of Wendell Gray.)

two-fold, to get a statement of the facts surrounding the accident, and to tender him compensation. Now, that was my complete purpose in calling on him.

Q. You had already computed the amount from the sources you had available as to what that compensation would be?

A. Before tendering him compensation, I had Miss Anderson call the hiring hall, Mr. Foeller, and secure from him over the telephone a statement of the total earnings for the year preceding the accident. It is possible that is not up to date and not quite exact, and we drew the compensation check based on the information I received, and when I tendered it to Mr. Pletz, I informed him that if it later developed that his earnings were greater, it would be readily adjusted without any trouble at all.

Q. Did you at any time subsequent tender him compensation?

A. I don't remember that I did, I don't remember of calling on him more than once for that purpose. I do believe I [224] made two trips to the hospital to see Mr. Pletz.

Q. Did you see him in Mr. Pickett's office at different times subsequent to his release from the hospital?

A. The only time that I have seen him in Mr. Pickett's office was about a week ago, I was discussing some claims with Mr. Pickett, and Mr. Pletz

(Testimony of Wendell Gray.)

called at the office, and Mr. Pickett saw him immediately, or at least while I was in Mr. Pickett's office, and that is the only time that I remember, I have no recollection of ever having seen him again. Usually when the men come into the office, Mr. Pickett talks to them.

Mr. Lord: I think that is all, any cross examination?

Mr. Pickett: No, I think that is all.
(Witness excused.)

Mr. Lord: Now, Mr. Marshall, it is our contention here that the formality of filing a claim is materially waived in this proceeding, and I really want the record that you have formulated since the inception of this claim to become a part of any matter that might be available on appeal to a court in the event you should decide the matter against us.

Mr. Pickett: I think by law you certify those up.

The Commissioner: Let them have them, they may have no objection to them being introduced in evidence as part of this record.

Mr. Lord: I then offer in evidence the official file of the United States Deputy Commissioner in case No. 431-6, which commences with an employer's first report to the Deputy Commissioner of accident, and which is signed as of date [225] November 15, 1935, and ending with a notice of a postponed hearing, and ask that it be marked "Claimant's Exhibit 2".

The Commissioner: You have no objection to it going in?

Mr. Pickett: None whatever.

(Thereupon the original file in the above entitled claim is received and filed in evidence and marked

"CLAIMANT'S EXHIBIT 2",
and is as follows:)

"United States Employees' Compensation
Commission

Office of Deputy Commissioner Wm. A. Marshall
Case No. 431-6

Insurance Carrier's No. 82

**EMPLOYER'S FIRST REPORT
TO DEPUTY COMMISSIONER OF ACCI-
DENT OR OCCUPATIONAL DISEASE**

Employer:

1. Employer's name SS West Planter, Chas.
R. McCormick Lumber Co. of Dela &/or Mc-
Cormick Steamship Co.

2. Office address Foot of N. W. Irving St.,
Portland, Oregon

3. Nature of business shipping

4. Insurance carrier Fireman's Fund Ins.
Co.

5. When was carrier notified 11-14-35 B16-36

Injured Person:

6. Full name of injured person G. Pletz
His check No. B54-37

7. Address: Street and No. 1915 S. W. 11th Ave.

City or town Portland, Ore.

8. Sex male Age 32 Speak English yes

9. Injured person's regular occupation long-shoreman [226]

B56-37

10. Was he injured in regular occupation?
Yes If not, occupation when injured

11. Wages or average earnings per day,
\$.95¢ hr.

12. Working days per week..... Any other
advantage.....

13. Length of service in occupation..... Were
full wages paid for day of injury? Yes.

The Injury:

14. Place where injury occurred Aboard
SS West Planter, Portland, Oregon.

15. Name of foreman Chas. Rudberg

16. Date of accident or first illness Nov. 12,
1935 7:30 P.M. Last day worked Nov. 12, 1935

17. When did you or your foreman first
have knowledge of injury? At time

18. Describe in full how alleged accident
occurred, or how employee was exposed to al-
leged hazard: While assisting in the stowage
of empty drums, a drum fell off slingload, fall-
ing into hold, striking Pletz in back

19. Machine, tool, or thing in connection
with which accident or disease occurred

Nature and Exent of Injury:

20. Nature of injury or occupational disease injured back

21. Was member or part of member lost?
no

22. Will injury probably result in serious head or facial disfigurement? no

23. Did injury cause loss of time? yes If "yes", on what date? Nov. 13, 1935

24. Has injured person returned to work? no If "yes", on what date? [227]

25. Did you provide or authorize medical attention? Yes When? Nov. 12, 1935,

26. Physician Dr. L. V. Belknap, Medical Dental Bldg., Portland, Ore.

27. Hospital St. Vincent's Hospital, Portland, Oregon. Firm name McCormick Steamship Company.

Dated Nov. 15, 1935

(Signed) B. K. FOSTER"

Wm. A. Marshall

"Rafferty & Pickett
410 Mead Building
Portland, Oregon

November 18, 1935

Oregon 28507

G. Pletz vs. SS West Planter Fed. 11-12-35

Mr. Wm. A. Marshall

Deputy Commissioner

620 Fed. Office Bldg.

Seattle, Washington

Dear Sir:

Enclosed herewith you will find the following:

1. Form 202, first notice of accident.

The foregoing notice pertains to a claim of G. Pletz against the SS West Planter and/or McCormick Steamship Co. This claim arises out of an accident that occurred November 12th at Portland, Oregon, on board the SS West Planter.

Yours very truly,

(Sgd) DAVID C. PICKETT"

DCP:RA

1 [228]

**"United States Employees' Compensation
Commission**

Office of Deputy Commissioner

**Administering Longshoremen's and Harbor
Workers' Compensation Act.**

ATTENDING PHYSICIAN'S REPORT

1. Name of injured person G. Pletz
2. Present address 1505 S. W. Mill Street,
Portland, Oregon
3. Name of employer McCormick SS Co. SS
West Planter
4. Address of employer Portland, Oregon
5. Date of accident or first illness Novem-
ber 12, 1935, at 7:00 P. M.
6. Was first treatment rendered by you?
Yes. When? November 13, 1935
7. If not, by whom? Address:
8. When did you first treat claimant? Nov.
13, 1935
9. Who engaged your services? Claimant
10. Was injured person removed to hospi-
tal? Yes. Name and address of hospital St.
Vincent's
11. State in patient's own words how acci-
dent occurred or occupational disease was
caused: Lard drum fell and hit lower back
12. Give an accurate and complete descrip-
tion of the nature and extent of injury which
resulted from the accident or occupational ex-
posure (state your objective findings), mark-

ing diagrams on back of this form: Contused back—X-rays neg.

13. Is the claimant's present disability a result of the injury above described? Yes. [229]

14. In your opinion, was the accident or occupational exposure, as above described, a competent producing cause of the injury sustained? Yes

15. Will the injury result in

(a) Permanent defect? No. If so, what?

(b) Serious facial or head disfigurement

16. Is there any history or evidence present, of pre-existing injury or disease, and if so, what? No.

17. On what date do you think the injured person will be able to resume his usual work? 6 wks to 3 mos.

18. On what date able to do any work and nature of work?

19. I am a physician duly licensed in the State of Oregon, and graduated in the year 1919 from University of Oregon Medical College.

(Sgd) LELAND V. BELKNAP
Attending Physician

Dated November 19, 1935 Address Portland,
Oregon

State of Oregon,
County of Multnomah—ss.

_____, being duly sworn, deposes and says:
That he is the physician who subscribed to the
above (or attached) report; that he has read
the same and knows the contents thereof; that
the same is true to the knowledge of deponent,
except as to the matters therein stated to be
alleged on information and belief, and as to
those matters he believes it to be true.

Subscribed and sworn to before me this 19th
day of [230] November, 1935.

(Sgd) ESTHER C. PERRY

Notary Public for Oregon.

Comm. expires Aug. 17, 1937."

"United States Employees' Compensation
Commission

Office of Deputy Commissioner

Wm. A. Marshall

Administering Longshoremen's and Harbor
Workers' Compensation Act.

**NOTICE TO THE DEPUTY COMMIS-
SIONER THAT THE PAYMENT OF
COMPENSATION HAS BEGUN WITH-
OUT AWAITING AWARD**

(To be submitted in duplicate to Deputy
Commissioner, who will forward copy to Com-
mission)

1. Name of employer SS West Planter,
Charles R. McCormick Lumber Co. of Dela-
ware &/or McCormick Steamship Co.

2. Office address: Street and No. Foot of
N. W. Irving City or town Portland, Ore.

3. Name of injured person G. Pletz

4. Present address: Street and No. 1505
S. W. Mill St. City or town Portland, Ore.

5. Date of accident or first illness Nov. 12,
1935 Date disability began Nov. 13, 1935

6. Compensation is to be paid to G. Pletz

7. Average daily wage \$..... multiplied by
=\$1109.82 divided by 52=average weekly wage
21.34 multiplied by $\frac{2}{3}$ =compensation rate,
\$14.23

8. Compensation shall be payable from the
20 day of November, 1935, until notice is given
the Deputy Commissioner that payment has
been stopped or suspended. [231]

9. Date of first payment Nov. 26, 1935

Name of Insurance Carrier

Fireman's Fund Insurance Company

Signed by RAFFETY & PICKETT

Official title Claim Attorneys

Dated Nov. 26, 1935"

vs. G. Pletz

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"Raffety & Pickett
410 Mead Building
Portland, Oregon

November 26, 1935

Oregon 28507

G. Pletz vs. SS West Planter 11-12-35

Mr. Wm. A. Marshall
Deputy Commissioner
620 Fed. Office Bldg.
Seattle, Washington

Dear Sir:

Enclosed herewith you will find the following:

1. Form 206, notice that payment of compensation has begun.

The foregoing notice pertains to the claim of G. Pletz against the SS West Planter and/or McCormick Steamship Co. This man's disability began November 13th and eliminating the waiting period, compensation is payable from November 20th.

We ascertained from the Longshoremen's Hall that this workman's earnings averaged \$21.34 per week. This entitles him to compensation at \$14.23 per week. We are paying him at this rate.

Yours very truly,
(Sgd) DAVID C. PICKETT" [232]

Wm. A. Marshall

**"Raffety & Pickett
410 Mead Building
Portland, Oregon**

December 4, 1935**Oregon 28507****G. Pletz vs. SS West Planter 11-12-35**

**Mr. Wm. A. Marshall
Deputy Commissioner
620 Fed. Office Bldg.
Seattle, Washington**

Dear Sir:

We have tendered compensation to Mr. Pletz on account of the injury which he received November 12, 1935, while employed on the SS West Planter, but he has refused to accept the same.

**Yours very truly,
(Sgd) DAVID C. PICKETT**

DCP:FW**1"**

**"United States Employees' Compensation
Commission**

**Office of Deputy Commissioner Administering
Longshoremen's and Harbor Workers'
Compensation Act**

REQUEST FOR ADDITIONAL REPORTS

1/10/36, 193.....

Mr. David C. Pickett,
410 Mead Bldg.,
Portland, Oregon)

Dear Sir:

Will you kindly refer to the case of G. Pletz injured on 11-12-35, 193....., while in the employ of SS "West Planter" Chas. R. McCormick Lbr. Co. of Dela. and furnish the following reports: [233]

If the period of disability with loss in pay due to the injury has extended beyond 49 days, claimant should be compensated for the first week of disability, pursuant to Section 6. When claimant is finally discharged from treatment by the attending physician, kindly submit supplementary medical report with special reference to permanent partial disability.

If complete or adequate information can not be given on the specified printed blanks, kindly

Wm. A. Marshall

report by letter, sending this office the original
and one copy. Your cooperation is solicited.

Very truly yours,

Deputy Commissioner."

"Raffety & Pickett
410 Mead Building
Portland, Oregon

January 11, 1936

Oregon 28507

G. Pletz vs. SS West Planter 11-12-35

Mr. Wm. A. Marshall

Deputy Commissioner

620 Fed. Office Bldg.

Seattle, Washington

Dear Sir:

Your case No. 431-6

I have your letter dated January 10, 1936,
inquiring regarding payment of compensation
to Mr. Pletz. On December 4, 1935, I addressed
a communication to you stating that Mr. Pletz
had refused to accept compensation under the
Longshore- [234] men's and Harbor Workers'
Compensation Act.

Up to the present time Mr. Pletz has not
accepted compensation.

Yours very truly,

(Sgd) DAVID C. PICKETT

DCP:FW

vs. G. Plets

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"November 5, 1936 431-6"

Messrs. Raffety & Pickett,
410 Mead Building,
Portland, Ore.

Ore. 28507

Gentlemen:

Re: G. Pletz, injured 11-12-36
McCormick SS "West Planter"

This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise as to the present status of the matter.

Yours truly,
CFO/IK" Examiner-Investigator.

"Raffety & Pickett
410 Mead Building
Portland, Oregon"

Oregon 28507

November 6, 1936

G. Pletz vs. SS West Planter 11-12-35.

Mr. Wm. A. Marshall
Deputy Commissioner [235]
620 Fed. Office Bldg.,
Seattle, Washington

Your case No. 431-6

Dear Sir:

I have your letter of November 5, 1936. This is to advise you that at the present time Mr.

Pletz claims to be suffering from certain subjective symptoms. The doctors by whom I have had him examined and under whose treatment he has been have been unable to find any objective symptoms, and have advised me that he is not really disabled. Recently, however, I put him under the care of Dr. Leon Goldsmith with a request to Dr. Goldsmith to examine him thoroughly with the view of determining his true physical condition. I have not had a report from Dr. Goldsmith.

Yours very truly,
(Sgd) DAVID C. PICKETT

DCP:FW"

**"United States Employees' Compensation
Commission**

**Office of Deputy Commissioner Administering
Longshoremen's and Harbor Workers'
Compensation Act.**

REQUEST FOR ADDITIONAL REPORTS

March 2, 1937

**Messrs. Raffety & Pickett,
410 Mead Building,
Portland, Ore.**

Dear Sir:

**Will you kindly refer to the case of G. Pletz
injured on 11-12-35, while in the employ of**

McCormick Lbr. SS West Planter, and furnish the following reports? [236]

We should be glad to be advised as to the status of the matter subsequent to your letter of Nov. 6, 1936.

If complete or adequate information can not be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited.

Very truly yours,

Deputy Commissioner"

"Raffety & Pickett
410 Mead Building
Portland, Oregon

March 8, 1937

Oregon 28507

Gus Pletz vs. SS West Planter 11-12-35

Mr. Wm. A. Marshall

Deputy Commissioner

620 Fed. Office Bldg.,

Seattle, Washington

Your case No. 431-6

Dear Sir:

I have your inquiry of March 2, 1937, inquiring as to the status of this claim subsequent to our letter of November 6, 1936. I beg to state

Wm. A. Marshall

that this man still claims to be suffering from disability resulting from the accident. None of the doctors to whom I have sent him can verify his claims of disability. From my conversation with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and to secure from me an agreement for perpetual medical care. [237]

Yours very truly,
(Sgd) DAVID C. PICKETT"

DCP:RA

**"United States Employees' Compensation
Commission**

**Office of Deputy Commissioner
Wm. A. Marshall**

**Administering Longshoremen's and Harbor
Workers' Compensation Act.**

**EMPLOYEE'S CLAIM FOR
COMPENSATION**

Injured Person:

1. Name of employee G. Pletz Employee's
check No.

2. Address; Street and No. 1915 S. W. 11th
Ave. City or Town Portland, Ore.

3. Sex Male Age 33 Married, single, wid-
owed Single

4. Do you speak English Yes Nationality
German.

5. State regular occupation longshoreman

6. What were you doing when injured?
Longshoring.

7. (a) Wages or average earnings per day
\$.95 hour. (Include overtime, board, rent, and
other allowances.)

(b) Per week, \$..... (c) Were you em-
ployed elsewhere during week in which you
were injured?..... (d) If so, state where and
when

8. Were you paid full wages for day of ac-
cident? Yes

Employer:

9. Employer McCormick Steamship Com-
pany—SS West Planter

10. Office address: Street and No. 618 N. W.
Front Ave. City or Town Portland, Ore. [238]

11. Nature of business Steamship

The Injury:

12. Place where injury occurred On SS
West Planter, Portland, Ore.

13. Name of foreman Chas. Rudberg

14. Date of accident or first illness, the 12
day of Nov. 1935 at 7:30 o'clock P.M.

15. How did accident happen or how was
occupational disease caused? While stowing
empty drums, a drum fell from slingload into
hold and struck me in the back. I was working
in the hold.

Nature and Extent of Injury:

16. State fully nature of injury or occupa-
tional disease: Injured back

17. On what date did you stop work because of injury? Nov. 13, 1937

18. Have you returned to work? (Yes or no) No. If "Yes", on what date?

19. Does injury keep you from work? (Yes or no.) Yes.

20. Have you done any work in period of disability? No.

21. Have you received any wages since injury? No. If so, from and to what date?

22. Has injury resulted in amputation? No
• If so, describe same.....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes.

24. Attending physician: Name Dr. L. V. Belknap Address [239] Medical Dental Bldg.

25. Hospital: Name St. Vincent's Hospital, Address, Portland, Ore.

26. Have you given your employer notice of injury? (Yes or No) Yes When Nov. 12, 1937

27. If such notice was given, to whom? Chas. Rudberg

28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my will-

vs. G. Pletz

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ful intention, and in support of it I make the foregoing statement of facts.

[Signed] By GUS PLETZ

Claimant.

Dated April. 19, 1937 Mail address 1915
S. W. 11th Ave., Portland, Ore."

"April 20, 1937

431-6

Mr. Gus Pletz,
1505 S. W. Mill St.,
Portland, Oregon

Dear Sir:

This will acknowledge receipt of your formal claim for compensation, on account of the injury you sustained on November 12, 1935.

I will be in Portland on Friday and Saturday of this week for the purpose of holding hearings and would be entirely willing to have your case heard at that time but have learned that Mr. [240] Pickett who represents the employer and insurance carrier in connection with your claim will be out of the city. Because of this it will be necessary for me to set the matter for hearing on the subsequent Portland visit.

Yours truly,

Deputy Commission, Dist. #14.

WAM:MF"

**"United States Employees' Compensation
Commission**

Case No. 431-6

**In the Matter of the Claim for Compensation
under the Longshoremen's and Harbor
Workers' Compensation Act.**

G. Pletz,

Claimant.

against

**SS "West Planter" &/or Chas. R. McCormick
Lbr. Co. of Dela. &/or McCormick SS Co.
Employer.**

Fireman's Fund Insurance Company,

Carrier.

NOTICE OF HEARING

**Mr. WM. P. LORD,
620 Spalding Bldg.,
Portland, Ore.**

**MR. ROSCOE F. HUNT,
Court House,
Portland, Oregon**

**To Mr. G. Pletz,
Address 1915 S. W. 11th Avenue, Portland,
Ore.**

**And SS "West Planter" &/or Chas. R. Mc-
Cormick Lbr. Co. of Dela. &/or McCormick
SS Co.,
Address Foot of N. W. Irving Street, Port-
land, Oregon**

And Raffety & Pickett,

Address 410 Mead Bldg., Portland, Oregon

[241]

You are hereby notified that upon application made by Claimant, an interested party in the above entitled claim, a hearing on such claim is hereby ordered, to be held before Wm. A. Marshall, Deputy Commissioner 14th Compensation District of the United States Employees' Compensation Commission, at the office of the Oregon State Industrial Accident Comm., 1002 S. W. Salmon Street, In the City of Portland, Oregon on the 8th day of May, 1937, at 10.30 o'clock A. M. of that day.

In testimony whereof, the undersigned, a Deputy Commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at Seattle, Washington, this 29th day of April, 1937.

Deputy Commissioner.

14th Compensation District."

"May 4, 1937

Mr. Wm. P. Lord,
620 Spalding Bldg.,
Portland, Oregon

Mr. David C. Pickett,
410 Mead Bldg.,
Portland, Oregon

Re: S. Jensen, #106-8

J. W. Murphy, #7-771

Warwick West, #245-15

G. Pletz, #431-6

Gentlemen:

It has been found necessary to postpone the hearings in the four cases above named which have been set for Saturday morning, May 8, 1937. It is my understanding that this postponement has been occasioned by the serious illness of medical [242] witnesses.

Yours truly,
Deputy Commissioner, Dist. #14.

WAM:MF

Copy to Hunt

Employers
Claimants"

vs. G. Pletz

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"Raffety & Pickett
410 Mead Building
Portland, Oregon

May 4, 1937

Oregon 28507

Gus Pletz vs. SS West, Planter 11-12-35

Mr. Wm. A. Marshall
Deputy Commissioner
620 Fed. Office Bldg.
Seattle, Washington

Your case No. 431-6

Dear Sir:

I have just talked with Mr. Lord regarding the above entitled claim of Gus Pletz. I am using Dr. L. V. Belknap as a witness in this case. Dr. Belknap has been in the hospital with pneumonia and has just been moved home and has not been able to resume his practice and as a result will not be available as a witness on Saturday. Mr. Lord has consented that this case go over for this reason.

Yours very truly,

[Sgd] DAVID C. PICKETT
DCP:RA" [243]

Wm. A. Marshall

"Raffety & Pickett
410 Mead Building
Portland, Oregon

May 6, 1937

Oregon 28507

Gus Pletz vs. SS. West Planter 11-12-35

Mr. Wm A. Marshall
Deputy Commissioner
620 Fed. Office Bdg.,
Seattle, Washington

Dear Sir: Your case No. 431-6

Enclosed herewith you will find the following:

1. Form 207, notice that claim will be controverted.

The foregoing notice pertains to the claim of Gus Pletz against the SS West Planter, Charles B. McCormick Lumber Company of Delaware and McCormick Steamship Company.

Yours very truly,

DAVID C. PICKETT

[Sgd]
DCP:RA

1"

**"United States Employees' Compensation
Commission**

**Office of Deputy Commissioner
Wm. A. Marshall**

**Administering Longshoremen's and Harbor
Workers' Compensation Act.**

**NOTICE TO THE DEPUTY COMMIS-
SIONER THAT CLAIM WILL BE
CONTROVERTED**

1. Name of employer
SS West Planter—&/or Chas. R. McCormick Lumber Company of Delaware and McCormick Steamship Company.
2. Office address: Street and No. 618
N. W. Front City or Town Portland, Oregon.
[244]
3. Name of injured person G. Pletz
4. Present address: Street and No. 1915
S. W. 11th City or Town Portland, Ore.
5. Date of alleged accident or first illness
Nov. 12, 1935, 7:30 P. M.
6. Nature of alleged accident or occupational disease Injured back
7. When was notice of injury received from employer? at once
8. This case will be controverted for the following reasons:
 - (a) For weekly wage? _____
 - (b) For rate of compensation? _____
 - (c) For period of disability? _____

Wm. A. Marshall

(d) If controverted for any other reason, state fully below:

1. Because no payments of compensation were made in this claim and the claimant did not file a claim for compensation within one year after the date of the injury, as prescribed by subdivision (a), Section 13, of the Longshoremen's and Harbor Workers' Compensation Act.
2. Because the alleged disabilities do not result from the accident.
for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? No. [245]

Name of Insurance Carrier

**FIREMAN'S FUND INSURANCE
COMPANY**

[Signed] By **DAVID C. PICKETT**

Official title

Claim Attorneys

Dated May 6, 1937

**"United States Employees' Compensation
Commission**

**Fourteenth Compensation District
Case No. 431-6**

**In the matter of the claim for compensation
under the Longshoremen's and Harbor
Workers' Compensation Act.**

G. Pletz,

Claimant,

against

**SS "West Planter" &/or Chas. R. McCormick
Lumber Company of Delaware and/or Mc-
Cormick Steamship Company.**

Employer,

**Fireman's Fund Insurance Company,
Insurance Carrier.**

**To: Wm. A. Marshall, Deputy Commissioner
for the Fourteenth Compensation District
of the United States Employees' Compensa-
tion Commission established under the
provisions of the Longshoremen's and Har-
bor Workers' Compensation Act: G. Pletz:
and Wm. P. Lord, his attorney,**

**You and each of you will please take notice
that the employer and the insurance carrier
have controverted, and, at the proposed hear-
ing, will object to consideration, by said Deputy
Commissioner, of the above entitled claim of
G. Pletz, as claimant, against the SS West**

Planter, Charles R. McCormick [246] Lumber Company of Delaware and McCormick Steamship Company, as employer, and Fireman's Fund Insurance Company, as insurance carrier, on the grounds and for the reason that said claimant did not file a claim for compensation within the time prescribed by subdivision (a), Section 13 of the Longshoremen's and Harbor Workers' Compensation Act. No compensation was paid in this claim and the claimant failed to file a claim for compensation within one year after the date of the accident for which compensation is claimed, and said employer and said insurance carrier file objection to such failure, and by reason thereof, said claimant's right to compensation for disability under this Act is barred.

Dated at Portland, Oregon, this 6th day of May, 1937.

[Sgd]

DAVID C. PICKETT
Attorney for Employer
and Insurance Carrier"

"May 11, 1937-

431-6

Mr. Wm. P. Lord,
Spalding Building,
Portland, Ore.

Dear Sir:

Re: G. Pletz, 431-6

Mr. Pickett has now filed a notice of contro-

versy and objections in the above entitled case and copies of same will be found enclosed.

As I will be away for about ten days in California, this case cannot be heard until either about May 29, 1937, or June 5, 1937, and notice will be sent to the parties as is the practice. [247]

Yours truly,

Deputy Commissioner, District #14.

WAM/TK"

"May 26, 1937

Mr. David C. Pickett,
410 Mead Building,
Portland, Ore.

Mr. Wm. P. Lord,
Spalding Building,
Portland, Ore.

Gentlemen:

Please take notice that hearings will be held in the following four cases on Saturday morning, June 5, 1937, at the hours stated:

9:00 A. M.—G. Plets v. McCormick
Steamship Co. and Fire-
man's Fund Insurance Co.

9:30 A. M.—Warwick West v. McCor-
mick Steamship Co. and
Fireman's Fund Insurance
Co.

10:00 A. M.—S. Jensen v. Consolidated
Steamship Companies and
Fireman's Fund Insurance
Co.

10:30 A. M.—J. W. Murphy v. Interna-
tional Stevedoring Co. and
Fireman's Fund Insurance
Co.

Deputy Commissioner, District #14.
WAM/IK"

"United States Employees' Compensation
Commission

Seattle, Washington,
June 1, 1937.

Mr. Wm. P. Lord,
Spalding Bldg.,
Portland, Ore. [248]

Mr. David C. Pickett,
410 Mead Building,
Portland, Ore.

Gentlemen:

Re G. Pletz, 431-6
Warwick West, 245-45
S. Jensen, 106-8
J. W. Murphy, 7-771.

Because of the illness of Mr. Pickett, the

vs. G. Plets

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hearings set in the four above cases are postponed to a date to be fixed later.

Yours truly,

Deputy Commissioner, District #14.

WAM/IK"

"July 6, 1937

431-6

Mr. Wm. P. Lord,
405 Henry Bldg.,
Portland, Oregon

Dear Sir:

Re: G. Plets, #431-6

As promised, I am writing to give you such information concerning the status of this case as is found in the file. G. Plets was injured November 12, 1935, on the SS "West Planter" while employed by the McCormick Steamship Company. Compensation was tendered by Mr. Pickett and refused by Mr. Plets. On April 30, 1937, Mr. Plets filed a formal claim in this office, which was more than one year after the date of injury. Subsequently Mr. Pickett filed a notice of controversy upon the ground that no claim was filed within one year and also that the alleged disabilities do not result from the accident. It appears to me that this claim is outlawed.

Yours truly,

Deputy Commissioner, Dist. #14."

WAM:MF [249]

**"United States Employees' Compensation
Commission**

Fourteenth Compensation District

Case No. 431-6

**In the matter of the claim for compensation
under the Longshoremen's and Harbor
Workers' Compensation Act.**

G. Pletz,

Claimant,

against

**SS "West Planter" &/or Chas. R. McCormick
Lbr. Co. of Dela. &/or McCormick SS Co.,
Employer,**

**Fireman's Fund Insurance Company,
Insurance Carrier.**

NOTICE OF POSTPONED HEARING

**Please take notice that the hearing previously
set in the above entitled case for Portland,
Oregon on June 5, 1937, and postponed, will
now be held at the office of the Oregon State
Industrial Accident Commission, 1002 S. W.
Salmon Street, Portland, Oregon at 9:00 A. M.
on July 23, 1937.**

**Given under my hand at Seattle, Washington
this 14th day of July, 1937.**

**Deputy Commissioner,
Fourteenth Compensation
District.**

Mailed to:

Mr. G. Plets, 1915 S. W. 11th Avenue, Portland, Ore.

SS "West Planter" &/or Chas. R. McCormick Lbr. Co. of Dela. &/or McCormick SS Co. Foot of N. W. Irving Street, Portland, Ore.

Raffety & Pickett, 410 Mead Bldg., Portland, Oregon.

Mr. Wm. P. Lord, 405 Henry Bldg., Portland, Oregon

Mr. Roscoe F. Hunt, Court House, Portland, Oregon."

Mr. Lord: I will call Mr. Pickett. [250]

MR. DAVID C. PICKETT

is called as a witness in behalf of the claimant, and having been first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination

Questions by Mr. Lord:

Q. Will you look over here, Mr. Pickett, I notice here on the first page of this "Exhibit 2" of the claimant, there is the employer's first report, is that signed by the McCormick Steamship Company?

A. That is signed by Mr. Foster, who is in the claim department of the McCormick Steamship Company.

Q. Where is he located?

A. He is located at the McCormick Terminal down on the waterfront.

(Testimony of David C. Pickett.)

Q. On November 18th, 1935, there is a letter addressed to Mr. Marshall, signed by David C. Pickett, is that your signature? A. Yea.

Q. Or the signature authorized by you?

A. That is my signature.

Q. And this letter was mailed to Mr. Marshall?

A. Yes, this letter was mailed to Mr. Marshall. The routine of that is that the notice that you referred to first, signed by McCormick Steamship Company, came to our office and then we forwarded it to Mr. Marshall's office.

Q. Then you recognize the signature of Dr. Belknap?

A. That is Dr. Leland V. Belknap's signature on the attending physician's report, which is dated November 19, 1935. [251]

Q. Now, as attorney for the insurance carrier in this matter, will you admit that all the letters which bear your signatures contained in this file were written by you or under your direction and mailed to Mr. Marshall?

A. I find that they are not all signed by me, even though my name is on them, but they were signed on behalf of me, and I assume full responsibility for the signatures.

Q. And will you admit as attorney for the insurance carrier in this proceeding that the letters which are written on carbon copies and found in the file and directed to you or to the McCormick Steamship Company, or to the firm of Raffety & Pickett were

(Testimony of David C. Pickett.)

sent to you and received by you by the proposed sender thereof?

A. You mean Mr. Marshall's office?

Q. Yes, sir.

A. I think those letters were received, and I think the originals are all in our files.

Q. And you are willing that these copies may be received as original documents in this proceeding for the purpose of any—

A. (Interrupting) There is no objection on account of the fact that they are carbon copies.

Q. During all the time of this proceeding, you were one of the attorneys for the insurance carrier in this proceeding, is that correct, Mr. Pickett?

A. That is right.

Mr. Lord: I think that is all, do you wish to cross examine yourself? [252]

The Witness: I don't believe so.

The Commissioner: You are satisfied with the responses, are you?

The Witness: I believe so, they were not thoroughly responsive.

(Witness excused.)

The Commissioner: Now, is there to be some medical testimony in this, or what?

Mr. Lord: Now, in this situation, I am assuming that the Deputy Commissioner will hold that compensation should be paid on this claim, and then

move that this claimant be submitted to a physician of the Deputy Commissioner's own choosing, for the purpose of independent testimony relating to his physical disabilities and the length of duration of T. T. D.

(Thereupon a discussion is held off the record between counsel, following which this stipulation was dictated:)

Mr. Lord: It is hereby stipulated between the respective attorneys in this proceeding that the Deputy Commissioner shall determine whether or not this claim has outlawed by the failure of the claimant to file a claim within one year after the injury, and if either party is dissatisfied with the decision of the Deputy Commissioner, in case of appeal to the United States District Court, as provided in the Longshoremen's and Harbor Workers' Compensation Act, neither party will controvert the question that the claimant did receive an injury at the time claimed, but the sole question to be determined by the [253] Court will be whether or not the claim has outlawed, and if the claim is sustained by the Court, then the claim shall be remanded to the Deputy Commissioner for determination of all questions.

(Thereupon the hearing is concluded.) [254]

[Endorsed]: No. 9896. United States Circuit Court of Appeals for the Ninth Circuit. Wm. A. Marshall, Deputy Commissioner, 14th Compensation

District, U. S. Employees Compensation Commission, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, Appellants, vs. G. Plets, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 15, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 9896

G. PLETZ,

Appellee,

vs.

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission,

FIREMAN'S FUND INSURANCE COMPANY,
a corporation, CHAS. R. McCORMICK LUM-
BER COMPANY OF DELAWARE, a corpo-
ration, and McCORMICK STEAMSHIP
COMPANY, a corporation,

Appellants.

**DESIGNATION OF PARTS OF RECORD
CONSIDERED NECESSARY BY APPELLANTS
FOR THE CONSIDERATION OF
THE ABOVE ENTITLED COURT.**

To Paul P. O'Brien, Esq., Clerk of the above entitled Court:

You will please take notice that as provided in the rules of practice of the above entitled court, appellants hereby designate as the parts of the record considered necessary on their appeal the following:

1. All of the transcript of the record received by the clerk of the above entitled court from the District Court of the United States for the District of Oregon, including transcript of testimony in four volumes, except that the captions, jurats and verifications be omitted.
2. The designation of points on which appellants intend to rely filed in the above court.
3. This designation of parts of record considered necessary.

Dated this 13th day of August, 1941.

CARL C. DONAUGH

United States Attorney for District of Oregon.

WILBUR, BECKETT; HOWELL & OPPENHEIMER

By **H. B. BECKETT**

Attorneys for Appellants

Due service of the foregoing Designation is hereby admitted this 13th day of August, 1941.

WM. P. LORD

Attorney for Appellee.

[Endorsed]: Filed Aug. 15, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**DESIGNATION OF POINTS ON WHICH
APPELLANTS INTEND TO RELY.**

To Paul P. O'Brien, Esq., Clerk of the above entitled Court;

The Appellants in the above entitled appeal hereby adopt as Appellants' Points on Appeal the statement of points on appeal, and each of them, appearing in the transcript of the record on appeal in the above entitled action.

Dated August 13th, 1941.

CARL C. DONAUGH,

United States Attorney for District of Oregon

**WILBUR, BECKETT, HOW-
ELL & OPPENHEIMER.**

By **H. B. BECKETT**

Attorneys for Appellants.

Due service of the foregoing Designation of Points is hereby admitted this 13th day of August, 1941.

WM. P. LORD

Attorney for Appellee.

[Endorsed]: Filed Aug. 15, 1941. Paul P. O'Brien, Clerk.

No. 9896

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

**WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission, FIREMAN'S FUND
INSURANCE COMPANY, a corporation,
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation, and
McCORMICK STEAMSHIP COMPANY, a
corporation,**

Appellants,

vs.

G. PLETZ,

Appellee.

**Upon Appeal from the District Court of the United
States for the District of Oregon.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

**United States Circuit Court of Appeals
for the Ninth Circuit**

Excerpt from Proceedings of Monday, March 2,
1942.

Before: Garrecht, Haney and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Robert T. Mautz, proctor for appellants, Fireman's Fund Insurance Company, et al., and by Mr. Wm. P. Lord, proctor for appellee, and submitted to the court for consideration and decision.

**United States Circuit Court of Appeals
for the Ninth Circuit**

Excerpt from Proceedings of Saturday, March
21, 1942.

Before: Garrecht, Haney and Healy,
Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
AND DISSENTING OPINION AND FIL-
ING AND RECORDING OF DECREE.**

By direction of the Court, Ordered that the type-written opinion and dissenting opinion this day ren-

dered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the
United States for the District of Oregon.

OPINION

Before: Garrecht, Haney and Healy,
Circuit Judges.

Healy, Circuit Judge.

This is a proceeding to review a compensation order made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA, §§901 et seq.

Appellee Pletz, a longshoreman in the employ of McCormick Steamship Company, was injured November 12, 1935, while working in the unloading of a vessel on navigable waters at Portland, Oregon. On April 20, 1937, he filed a claim for compensation. The claim was controverted by the insurance carrier on the ground that no payments of compensation had been made and the claim was not filed within one year of the injury as prescribed by

§13(a) of the Act.¹ The deputy commissioner sustained the controversial and rejected the claim. Appellee then sought review under the appropriate provision of the Act, and after hearing the district court remanded the matter with directions to make

¹So far as pertinent, §13 is as follows:

"§913. Time for filing of claims. (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. * * *

(b) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivisions shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

* * *

specific findings concerning an asserted waiver or estoppel on the part of the insurance carrier.

Upon remand there was a hearing before the deputy commissioner at which considerable evidence was taken. The commissioner found that the claimant "has not been misled or overreached by the employer or insurance carrier," and his claim was again rejected because not filed in time. It was ordered, however, that the carrier furnish the claimant treatment by a psychiatrist for the cure of his disability.

A complaint for review was again lodged in the district court; and after the making of extensive findings, including one relating to the mental capacity of the claimant, the court concluded that the carrier had waived the provisions of the Act requiring a timely filing of the claim and was estopped from asserting contrariwise. The deputy commissioner was directed to reject the controversial and to proceed to determine the amount of compensation to which claimant was entitled. This appeal followed.

It appears that as a result of the accident appellee was confined to the hospital for some weeks and was hospitalized a second time in February 1936. The carrier had immediate knowledge of the injury and made a prompt investigation to ascertain the rate of compensation, which rate it determined tentatively to be \$14.23 per week. A draft for this amount was tendered the claimant two weeks after the injury, but the payment was not accepted be-

cause the claimant thought his prior earnings entitled him to a larger sum. Under date of November 15, 1935, the carrier filed with the deputy commissioner what is denominated "employer's first report of accident." In this report it was stated that medical attention had been authorized, that the injured person had not returned to work, and that he would suffer loss of time. Shortly afterwards the carrier's attending physician reported to the deputy commissioner that the disability of the claimant was the result of his injury and that the man would not be able to resume work for a period of from six weeks to three months. On November 26, 1935, the carrier filed with the deputy commissioner a form denominated "notice that the payment of compensation has begun without awaiting award." The notice states that "compensation shall be payable from the 20 day of November, 1935 until notice is given the deputy commissioner that payment has been stopped or suspended." A letter accompanying the notice stated that the carrier had ascertained the workman's average earnings and that he was entitled to compensation at the rate of \$14.23 per week. The letter added "we are paying him at this rate." About a week later, however, the carrier wrote the deputy commissioner that compensation had been tendered the claimant on account of the injury, but that claimant had refused to accept the same. On January 10, 1936, the deputy commissioner advised the carrier that if the period of dis-

ability had extended beyond 49 days, claimant should be compensated for the first week, pursuant to §6. The carrier acknowledged this letter the next day, stating that "up to the present time Mr. Pletz has not accepted compensation."

Nothing further appears in the official records of the deputy commissioner until November 5, 1936, at which time a letter was directed to the carrier stating: "This is the case in which you advised the injured man had refused to accept compensation in December 1935. For completion of our file to date kindly advise as to the present status of the matter." The following day the carrier wrote acknowledging this letter and advising "that at the present time Mr. Pletz claims to be suffering from certain subjective symptoms," and that the doctor furnished by the carrier has been unable to find any objective symptoms. The carrier did not advise the commissioner in respect of the status of payments of compensation, whether any had been made, whether payments had been suspended, or whether the claimant had continued to refuse to accept the compensation tendered. On March 2, 1937, there was a further request for additional reports as to the status of the matter subsequent to November 6, 1936. In response, the carrier stated that "this man still claims to be suffering from disability resulting from the accident," and that "his chief aim seems to be to effect a lump-sum settlement" and to secure an agreement for perpetual medical care.

Supplementing this unusual record, we have the testimony of representatives of the insurance carrier taken at the hearing before the deputy commissioner after the cause had been remanded. From this testimony it appears that for a long time following upon the injury the carrier continued to recognize its obligation to pay compensation to appellee at a fixed weekly rate. It was understood on both sides that this weekly amount was based on a condition of total disability, either temporary or permanent as the case might prove. By the time the injured man had completed his second stay in the hospital—March 13, 1936—the carrier had ascertained that he was entitled to compensation at the somewhat higher rate of \$14.99 per week. Weekly payments at this rate continued to be offered him until at least as late as the end of April 1936, and perhaps much longer, certainly until well within a year of the time he filed his formal claim. There is during this period no suggestion that his disabling injury was thought to have been cured or that the carrier believed appellee was able to return to work. The representative of the carrier in immediate charge of the case thought that the disability was probably terminated several months prior to September 1936, but the precise date of the supposed termination is not stated. No intimation of this belief was conveyed at the time either to the commissioner or to appellee. When asked why a controversial was not filed with the deputy commissioner because of the supposed recovery, this witness

stated that there was no reason to file a controversial and that he did not understand that a report controverting the claim was due. The explanation of this attitude appears to lie in the fact that appellee was declining to accept the compensation tendered, asserting that his prior earnings entitled him to a larger weekly sum or that he would prefer a lump-sum settlement. In short, the carrier appears to have assumed that under the circumstances it was entitled to defer controverting liability until a formal claim was filed; and it is to be gathered that the deputy commissioner was of the same opinion.

We are satisfied that in this both the carrier and the commissioner mistook the requirements of the Act. Reference will presently be made to other provisions leading to this conclusion, but for the moment we examine §13(a) upon which the carrier relies. By that section an injured employee is given a year after cessation of voluntary payments within which to file a claim. Obviously, so long as payments continue it is the statutory theory that there is no occasion for filing a claim; but where payments are stopped or suspended the employee is put on notice that he must make formal claim within a year thereafter or forego further compensation. By a parity of reasoning where, as here, there is a continuing offer amounting to a tender of compensation based on a condition of total disability, the employee is entitled to assume that the carrier holds itself in readiness to pay the sums periodically of-

ferred;² and that he may dispense with the filing of a claim so long as that situation persists. We think, therefore, that the time limit prescribed by §13(a) applies not only to cases where compensation is actually paid, but to situations where the statutory compensation is tendered; and that the time limit does not commence to run until the continuing offer is withdrawn or the right to further payment controverted. For the purpose of the limitation, tender must be held the equivalent of payment.

The conclusion we have reached as to the proper interpretation of §13 is not only fortified but is virtually compelled by a perusal of §14, the pertinent portions of which are copied on the margin.³ There

²When pressed for his reasons for persistently failing to accept the compensation offered, appellee, with the irresistible logic of the unlettered, said " . . . I had a little money and I thought the money was as good there as if I had it, if I had it I could spend it. and Mr. Pickett said that he would settle with me, and I thought that I had that money there, and I could have it at any time I wanted it."

³"Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semi-monthly, except where the deputy commissioner de-

is little need to analyze the elaborate and imperative provisions of §14. Their obvious purpose is to render impossible of occurrence a failure of justice in the case of known disabling injuries falling within the terms of the Act. The central principle of this statutory scheme is that the employer shall pay compensation "periodically, promptly, and directly to the person entitled thereto, without an award," except only where liability is controverted. If for any cause the employer considers that his obligation to make such payments has terminated, he must immediately and unequivocally make his position known. In the

termines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the commission, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed

face of these blunt requirements the carrier can not admit liability and profess readiness at all times to pay the statutory compensation and then, when a claim therefor is filed, controvert liability on the ground that he has not performed his duty to make the payments and the claim therefore comes too late. The carrier here has suffered no prejudice because of the recalcitrant attitude of the employee in failing to accept the offered compensation. It is perhaps relieved of the obligation to pay the 10 per centum penalty imposed by subsection (e), but in all other respects it remains subject to the requirements of the Act.

The decree of the district court is affirmed.

under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

Haney, Circuit Judge, Dissenting.

I am unable to agree with either the reasoning or result set forth in the majority opinion for the following reasons:

Where, as here, the carrier promptly tenders a specified sum which is refused by the claimant for any reason, the claimant has a year from the time of his injury within which to reach an agreement with the carrier as to amount of compensation, or, failing that, to file a claim.

The effect of the majority opinion is to amend the statute so that the one-year period runs from the date of the "last tender" rather than from the date of the "injury" as is specified in the statute. The result of such amendment is to open, for each claimant, a way to indefinitely suspend the statute by merely failing to accept a tender. Such construction does not contribute to "prompt" disposition of the matter, an aim said in the majority opinion to be desired.

The majority further says: "For the purpose of the limitation, tender must be held the equivalent of payment". How there can be payment of a claim, the amount of which is not yet determined, is not clear. However, if the tenders were payment, then it is clear that claimant has been paid an amount in full satisfaction of his claim, which he is now contending is wholly insufficient. In addition, if claimant has been paid for the period for which tenders were made, then I assume he cannot again

force the carrier to pay for the same period, and his claim is thus reduced. This appears to me to be an unnecessary and unwise limitation.

It seems to me that the basic error of the majority opinion is that it rests upon construction by judicial legislation. It has been said that the province of the court is *jus dicere* and not *jus dare*. Amendment of the statute should be left to Congress.

In my opinion the order should be reversed.

[Endorsed]: Opinion and Dissenting Opinion.
Filed Mar. 21, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9896.

WM. A. MARSHALL, etc., et al.,

Appellants,

vs.

G. PLETZ,

Appellee.

DECREE

Appeal from the District Court of the United States for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellants for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered March 21, 1942.
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING MANDATE.

Upon motion of the above named appellants, through their attorneys, and good reasons appearing therefor,

It Is Hereby Ordered that the issuance of the mandate of this Court in the above-entitled cause be and the same is hereby stayed until the 29th day of May, 1942, in order that the said appellants may apply to the Supreme Court of the United States for the issuance of a writ of certiorari to this Court in the above cause, and in the event said application for a writ of certiorari is so filed, then it is further ordered that said mandate be further stayed until the said Supreme Court of the United States disposes of said case.

Dated this 10th day of April, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed April 10, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and ninety-one (291) pages, numbered from and including 1 to and including 291, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of April, 1942.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3045)

No. ~~1248~~ 93

Office - Supreme Court, U. S.

FILED

MAY 18 1942

WILLIAM J. DUFFLEY
CLERK

IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission, FIREMAN'S FUND
INSURANCE COMPANY, a corporation,
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation, and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARL C. DONAUGH,
United States Attorney,
U. S. Court House,
Portland, Oregon,

E. K. OPPENHEIMER,
ROBERT T. MAUTZ,
Board of Trade Building,
Portland, Oregon,

JOHN H. BLACK,
233 Sansome Street,
San Francisco, California,
Attorneys for Petitioners.

WM. P. LORD and
T. WALTER GILLARD,
Guardian Building,
Portland, Oregon,
Attorneys for Respondent.

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IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District; U. S. Employees Com-
pensation Commission, FIREMAN'S FUND
INSURANCE COMPANY, a corporation,
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation, and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

To the Honorable Chief Justice and the Associate
Justices of the Supreme Court of the United
States:

SUMMARY STATEMENT OF MATTER INVOLVED

This is a proceeding to review a compensation
order made under the provisions of the Longshore-
men's and Harbor Workers' Compensation Act, 33
U.S. C.A., Secs. 901 et seq.

The respondent filed this action in the District Court of the United States for the District of Oregon, seeking a mandatory injunction directed to the Petitioner, Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, requiring him to set aside his Orders of July 29th, 1937 (R. 19) and February 15th, 1940 (R. 25), rejecting respondent's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. The said Deputy Commissioner had rejected the claim of respondent for compensation under said Act upon the grounds: "(1) That the said claim was not filed within one year after the injury, and (2) That the claimant (respondent) has not been overreached by the employer or insurance carrier" (R. 35).

The respondent filed his complaint in the District Court on the 13th day of August, 1937 (R. 2). The District Judge was not satisfied with the findings of the Deputy Commissioner in his Order of July 29th, 1937, and, therefore, entered an order referring the cause back to the Deputy Commissioner so that he might make specific findings, covering each issue made by the parties and also authorizing the parties to offer further evidence before the Deputy Commissioner in support of their respective positions (R. 20, 21). Several hearings were thereafter held before the Deputy Commissioner in connection with respondent's claim (R. 105, 147, 181).

It was the contention of the respondent at the original hearing before the Deputy Commissioner on July 23, 1937 (R. 210-270) and also at the various subsequent hearings before said Deputy Commissioner, that, although the respondent had failed to file his claim for compensation with the Deputy Commissioner within the one year period after his injury, as required by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), yet the petitioning employer and the petitioning insurance carrier had waived the filing of the compensation claim by respondent within one year after his injury, and that the said petitioners by their actions were estopped from asserting that respondent had failed to file his claim for compensation within the time required by said Compensation Act.

On February 15th, 1940, the said Deputy Commissioner made and filed a subsequent Order rejecting the claim of respondent for compensation for the reasons above set forth. The Deputy Commissioner did order that the employer and insurance carrier should furnish the respondent with certain medical services. (R. 30-35)

After the making of said subsequent Order rejecting his compensation claim, the respondent, on the 19th day of February, 1940, filed in the said Federal District Court a supplemental complaint, wherein he sets forth his objections to the findings and conclusions of the Deputy Commissioner in his

said Order of February 15th, 1940 (R. 22-26).

It is the contention of the respondent in his supplemental complaint, as it is in his original complaint, that the action of the claim's attorney representing the petitioning insurance carrier was such as to estop the said carrier and the petitioning employer from claiming that respondent's claim for compensation was not filed within the time required by the said Longshoremen's Act (R. 25). It is further urged in said supplemental complaint that respondent's mentality was affected so that he did not appreciate the significance of his acts and was rendered incompetent to transact any important business (R. 23).

The petitioners filed Motions to Dismiss respondent's suit upon the ground that it appears from the face of the complaint, supplemental complaint and from the proceedings had before the Deputy Commissioner that respondent is not entitled to the relief demanded by reason of the fact that the evidence produced before the Deputy Commissioner at the various hearings held before him were sufficient to sustain the Orders of said Deputy Commissioner rejecting respondent's compensation claim.

The District Judge reached a conclusion contrary to that of the said Deputy Commissioner and found that the petitioning insurance carrier is estopped to assert that respondent's compensation claim was not timely filed and that said insurance

carrier waived the provisions of Section 13(a) of the Longshoremen's Act (33 U.S.C.A., Sec 913 (a)), requiring that a claim be filed within one year after the injury (R. 58). The said District Judge also made and entered a decree directing the said Deputy Commissioner to set aside the said Orders made by him on July 29th, 1937, and February 14th (15th), 1940, rejecting respondent's compensation claim filed by him with the Deputy Commissioner on April 10th, 1937, was a valid claim for compensation "and that the defendants (petitioners) * * are estopped from asserting contrariwise" (R. 61). Petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the said decree of the District Court (R. 78). The said Circuit Court of Appeals affirmed the decree of the District Court (R. 290). There was a dissenting opinion, however, by Circuit Judge Haney (R. 288).

The evidence in this case discloses that the respondent, Pletz, is a longshoreman and maritime worker. On November 12th, 1935, he was employed by the petitioner McCormick Steamship Company in loading some oil containers or vegetable drums on the steamship "West Planter." He was standing under the hatch combing on said ship when some of the drums or containers being loaded on the ship fell and one hit him in the back of the hip (R. 211, 212). He did not hurt his head in any way. Just got hurt on the back. He always had possession of his faculties so that he knew what he was doing and the business he was transacting.

(R. 214). Pletz was sent to the hospital by the McCormick Steamship Company (R. 212).

The law firm of Raffety and Pickett were the attorneys handling the claim of Pletz for the McCormick Steamship Company. They were not the general attorneys in Portland, Oregon, for said company (R. 186, 187). The petitioner Fireman's Fund Insurance Company was the insurance carrier for the McCormick Steamship Company under the said Longshoremen's and Harbor Workers' Compensation Act. When Pletz was injured, the matter of his claim was referred to Mr. Pickett by the said insurance company (R. 148, 269).

Several days after Pletz was injured, Mr. Wendell Gray, who was employed by Raffety and Pickett to investigate cases coming under the said Longshoremen's Act (R. 229), called upon Pletz at the hospital and secured a statement from him. The statement was signed November 15th, 1935 (R. 204, 205, 217, 230). Gray secured the statement in order that a report could be made to the Accident Commission (R. 217). The taking of this statement was merely a routine matter (R. 164).

On November 26th, 1935, Gray went back to the hospital and offered Pletz a compensation check (R. 162, 205, 206). The check was for \$14.22 (R. 161). This check was tendered the exact date it was due under the Longshoremen's Act (R. 162). Pletz refused the check tendered him by Gray, saying that he did not need the money, but that when

he got out of the hospital he would see Raffety and Pickett (R. 149, 218).

Pletz was in the hospital the first time until about Christmas, 1935 (R. 150, 212). He saw Pickett at the latter's office about three weeks after he got out of the hospital (R. 213). It was sometime between December 24th, 1935, and February 12th, 1936 (R. 161). Mr. Pickett offered to pay him compensation at this time. Pletz refused the offer (R. 219). Pickett offered Pletz \$14.75 a week, based upon a report he had relative to Pletz's earnings. Pletz claimed that the offer was not high enough (R. 150). In this connection, Mr. Pickett testified (R. 150):

"* * I told him (Pletz) that I was bound by the report from the bookkeeping department of the Employers but if he could bring in any other earnings we would check them, or he could go down to the waterfront and check them himself, but at any rate, if he was entitled to a higher rate, the acceptance of the amount I offered him would not prejudice his rights, but when it was finally found out what he was entitled to as a rate of compensation, that would be made up to him."

Mr. Pickett urged Pletz to see Mr. Marshall, the Deputy Commissioner relative to the amount of his compensation, and urged Pletz to take compensation (R. 174). Pletz always refused the compensation (R. 192). Pickett went so far as to endeavor to find out what compensation Pletz thought he was entitled to, and asked him if he would take \$18, \$20 or \$25 a week. Pletz was not satisfied. All

he had in mind was some sort of a liability settlement (R. 193). Pletz admits that he refused the compensation payments offered by Pickett (R. 139, 141, 142, 157, 221, 226). Pletz never made any attempt to secure information relative to his prior earnings, in order to show Mr. Pickett that the amount of compensation offered by him was less than the amount he was entitled to under the Longshoremen's Act.

Pletz consulted with his attorney, Mr. Green, relative to his compensation (R. 139, 225). Mr. Green told Pletz that he had a good case in which to try to break the Longshoremen's Act (R. 227). Pletz told Green to have the papers ready (R. 228). Pletz called upon Mr. Marshall, the Deputy Commissioner, before the year expired after his injury (R. 135), and admitted he had an attorney (R. 135-137). He told the Deputy Commissioner he was not satisfied with the rate of compensation offered him by Mr. Pickett. Mr. Marshall told Pletz if his earnings were higher he could secure a readjustment later (R. 136).

Mr. Marshall, the Deputy Commissioner, also made the following statement at one of the hearings before him (R. 144, 145):

"THE COMMISSIONER: Well, the statement that I will make is simply this: That he (Pletz) came to me while I was holding hearings in Portland and said that he, he mentioned the name of Green, Tanner & Boesen, and said that he was not satisfied with the rate of com-

pensation that had been offered him, and I explained to him that that question could be straightened out by referring to the payroll records, and they were open and accessible to him, and in that conversation he also stated that the attorney that he referred to, whom he had consulted, had said something about he could break the Act. I don't know whether Mr. Pletz used the word 'unconstitutional,' but that was the tenor of his explanation to me, and that was all that was said at the time of that conversation.

Mr. Beckett: What date was that?

The Commissioner: Oh, I don't know the date but it was some months after the injury, it was sometime after the injury, but I can't positively say the exact date, because I don't know.

Mr. Beckett: It was some months after the injury?

The Commissioner: Yes, it was some months after the injury.

Mr. Beckett: You are not of the impression that it was over a year after?

The Commissioner: No, I don't think it was. He is of the impression it was."

Pletz admitted he had talked to lawyers (R. 138), and that he had seen Marshall prior to August or September, 1936 (R. 153, 154). He at another time claimed that it was after the expiration of the first year following his accident that he saw Marshall (R. 145). Mr. Pickett recalled that he had seen Pletz in the law office of Green, Tanner & Boesen sometime prior to September, 1936 (R. 155, 156, 172). Mr. Pickett also informed Pletz that if he was in doubt as to his rights to see a lawyer (R. 175).

Pletz's conversations with Pickett (R. 189) "could be summed up in that he wanted a settlement, and I had better get a settlement if I wanted to save myself trouble. Now there was a kind of covert threat there, I don't mean personally against me, as though the results would be disastrous to us if we didn't settle with him."

Pletz also talked with his present lawyer, Mr. Lord, "At the hospital and several times on the street and once going to the Court House" about his case before the year passed following his accident (R. 201).

Pletz returned to the hospital a second time for an operation on February 12th, 1936, and was out again on March 13th, 1936 (R. 151, 152, 213). When Pletz got out of the hospital the second time he began to talk about a lump sum settlement (R. 152). It was not a case where Pickett could ordinarily make a lump sum settlement. Pickett talked about it some, but urged Pletz to take compensation (R. 152). At this time a thorough check had been made of Pletz's earnings and it was determined he was entitled to \$14.99 (R. 152).

During 1936 Pletz was in Pickett's office a dozen times—quite often (R. 132, 161, 222). Some times he would go to Pickett's office every week and some times he would delay quite a while between visits (R. 173). According to Pletz, Pickett was going to give him a lump sum settlement, but they could not come to any agreement because Pickett did not

think Pletz was in need of further medical care (R. 132, 140, 220-222).

Mr. Pickett talked lump sum settlement with Pletz because he made Pickett discuss it (R. 158). Pickett informed Pletz that a lump sum settlement could only be made in two instances. One was if there was a third party claim, and the other was under the Compensation Act where he had reached the point where he was not disabled and was able to return to work (R. 159). Pickett and Pletz had many discussions and Pickett could not make Pletz understand that he was sincere in his position that he could not make a lump sum settlement under the condition that existed (R. 160).

In this connection, Mr. Pickett further testified (R. 170):

"Back in August or September, 1936, in my discussion with Mr. Pletz regarding a lump sum settlement, and the payment of compensation, he made it very clear to me that he was not going to take compensation. From that time on I wasn't very clear in my own mind what my relation to Mr. Pletz was. As soon as it became apparent that he was going to urge a lump sum settlement, either as the result of a direct suit against the employer, or as a third party claim—I notified the attending physician that I didn't know whether we would be liable under the act, or whether the payment would have to come out of whatever adjustment would result from his demand for a lump sum settlement. For instance, if he would sue a third party, we usually have an understanding with the attending physician that our liability under the act is not to be followed out, and that the

collection will be—as the result of the lump sum settlement.”

Mr. Pickett did not know how to stop Pletz from talking a lump sum settlement (R. 176). He could not keep Pletz from talking about it (R. 177). Pickett explained to Pletz why a lump sum settlement could not be made (R. 178).

Mr. Pickett also testified (R. 157):

“Q. And inasfar as you know or inasfar as any of your dealings with Mr. Pletz were concerned, was he in any way misled or misinformed or played along, as you might call it, with the idea of having him lose or waive any of his rights?

A. No. He gave me to understand thoroughly that he had seen a lawyer. In fact, his conversation regarding the case led me to think he must have seen a lawyer, and it never entered my mind but that they had their plans, whatever it was, and that—well, I just never thought about his becoming delinquent in it, the thought never occurred to me.”

JURISDICTION

The decree was made and entered in the United States District Court for the District of Oregon on April 15, 1941 (R. 60, 61). The appeal to the United States Circuit Court of Appeals for the Ninth Circuit was perfected July 8th, 1941 (R. 78-82). The appeal was heard before three circuit judges (R. 277). Two of the judges concurred in rendering an opinion affirming the decree of the District Court (R. 278-287). On motion of petitioners herein the United States Circuit Court of Appeals for the

Ninth Circuit, on the 10th day of April, 1942, stayed the issuance of Mandate pending the determination of this petition for writ of certiorari by the Supreme Court of the United States (R. 291).

The jurisdiction of this Court is invoked under Section 240(a) of the Act of February 13, 1925, Title 28, Section 347, U.S.C.A.

QUESTIONS PRESENTED

1. Whether the provisions of Section 13(a) of the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C.A., Sec. 913(a)), requiring that claims for compensation for disability be filed within one year after the injury is mandatory and the compliance therewith jurisdictional.
2. Whether pleas of waiver or estoppel are available where a claim for compensation is not filed with the Deputy Commissioner within the time provided for by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)).
3. Whether an employer loses his right to disclaim liability to pay compensation to an injured employee where the said employee fails to file his claim for compensation with the Deputy Commissioner within one year after his injury and the employer and its insurance carrier are ready and willing to pay compensation to the said employee during said year, but said employee refuses to ac-

cept same, and where no controversial is filed by the employer or his insurance carrier during said year period, although the employer and the insurance carrier thought the workman was able to return to work prior to the expiration of the year period.

4. Whether, for the purpose of the limitation provided for in Section 13(a) of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A., Sec. 913(a)), an offer of compensation by an employer or its insurance carrier to an injured workman which is rejected by him, is the equivalent of payment of such compensation, and whether the said time limit does not commence to run until the continuing offer is withdrawn or the right to further payment is controverted.

(It was unnecessary for us to have objected to the numerous findings of the District Judge in this case. In cases of this character the sole question is whether the record discloses competent evidence to support the findings of the deputy Commissioner. The District Judge is not authorized to re-try the case. *Employers' Liability Assur. Corp. v. Hoage* (App. D.C.) 91 F. (2d) 318; *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 257, 258, 60 S. Ct. 544, 548, 84 L. Ed. 732, 736. Upon a Motion to Dismiss, the facts are admitted and no findings are necessary. *Thomas v. Peyser* (App. D.C.) 118 F. (2d) 369, 374.)

**REASONS RELIED ON FOR ALLOWANCE
OF WRIT.**

1. The construction of the Circuit Court of Appeals for the Ninth Circuit that, where an employer or its insurance carrier offers to pay an injured employee compensation under the Longshoremen's and Harbor Workers' Compensation Act, which he declines to accept, the time limit prescribed by Section 13(a) of said Act (33 U.S.C.A., Sec. 913(a)) for the filing of claims by injured employees does not commence to run until the continuing offer of compensation by the employer or its insurance carrier is withdrawn or a controversial filed with the Deputy Commissioner is in conflict with the decision of the Court of Appeals for the District of Columbia on the same matter in the case of *Fulton v. Hoage*, 77 F. (2d) 110, 112.

2. The construction of Section 13(a) of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A., Sec. 913(a)) by the Circuit Court of Appeals to the effect that for the purpose of the limitation therein provided tender of compensation is the equivalent of payment is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. *Bronson v. Rodes*, 74 U. S. 229, 250; 19 L. Ed. 141, 146.

3. The Circuit Court of Appeals for the Ninth Circuit in deciding that the claim of the respondent for compensation was not barred by the limitation

provided for in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. *Kobilkin v. Pillsbury*, 309 U. S. 619; 84 L. Ed. 983; 60 S. Ct. 465; *William Danzer & Co. v. Gulf R. Co.*, 268 U. S. 633, 636, 69 L. Ed. 1126, 1129, 45 St. Ct. 612, 613.

4. The Judges of the Circuit Court of Appeals for the Ninth Circuit were divided upon the questions of law involved in the case at bar, and therefore the questions involved should be passed upon by this Court.

5. The question whether the claim of the respondent was barred under the facts in this case is of such paramount importance to all employers and employees governed by the Longshoremen's and Harbor Workers' Compensation Act as to call for an exercise of this Court's power of supervision over this cause.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9896, *Wm. A. Marshall, Deputy Commis-*

sioner, 14th Compensation District, U. S. Employees Compensation Commission, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, Appellants, v. G. Pletz, Appellee, and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

CARL C. DONAUGH,
United States Attorney,
E. K. OPPENHEIMER,
ROBERT T. MAUTZ
JOHN H. BLACK
Attorneys for Petitioner.



**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
pensation Commission, FIREMAN'S FUND
INSURANCE COMPANY, a corporation,
CHAS. R. McCORMICK LUMBER COM-
PANY OF DELAWARE, a corporation, and
McCORMICK STEAMSHIP COMPANY, a
corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF COURTS BELOW

The opinion of the United States District Court for District of Oregon in this case has not been reported. It appears in the record at pages 37-40. The opinion in the Circuit Court of Appeals for the Ninth Circuit does not appear to be as yet officially reported. It is dated March 21, 1942, and appears on pages 278-289 of the record herein.

II.

JURISDICTION

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit is March 21, 1942 (R. 290).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Act of February 13, 1925, Title 28, Sec. 347, U.S.C.A.

The 38th Rule, paragraph 5, of the Revised Rules of this Court provides that where there are special and important reasons therefor a writ of certiorari will be granted by this Honorable Court. The matters hereinafter set forth disclose the basis and grounds on which it is contended that this Court has jurisdiction to review the decree of the court below and the grounds on which the jurisdiction of this Honorable Court is invoked, and it is deferentially submitted that said grounds bring the petition herein within the aforementioned Rule.

III.

STATEMENT OF THE CASE

This has already been set forth in the preceding petition at pages 1-12 thereof, which statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that under the facts of this case it was incumbent upon respondent's employer or its insurance carrier to have filed a controversial prior to the filing of a formal claim for compensation by respondent.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the time limit prescribed by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. A., Sec. 913(a)) for the filing of claims does not apply to cases where compensation is offered to an employee and refused by him, and that such time limit does not commence to run until the continuing offer is withdrawn or the right to further payment controverted.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that respondent's claim for compensation was not barred by virtue of the express provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)).

V.

SUMMARY OF ARGUMENT

Point 1. The limitation prescribed in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) for the filing of compensation claims is mandatory and compliance therewith is jurisdictional.

Point II. If the claim of a workman for compensation is not filed within the period provided for by the Longshoremen's and Harbor Workers' Compensation Act it is lost, and pleas of waiver and estoppel are of no avail.

Point III. Where an employer or its insurance carrier offers compensation to an injured employee, who refuses such offer, the employee must file his claim for compensation within a year after his injury or it will be barred under the provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), and the running of such time limit is not deferred until the continuing offer is withdrawn or the right to further payment controverted.

ARGUMENT

Point I.

The limitation prescribed in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) for the filing of compensation claims is mandatory and compliance therewith is jurisdictional.

Section 13(a) of said Compensation Act provides (33 U.S.C.A., Sec. 913(a)) :

"The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred."

It is conceded in this case that the respondent, Pletz, was injured on November 12th, 1935, that he did not file his claim for compensation with the Deputy Commissioner until April 20th, 1937, and that he has never been paid any compensation (R. 3, 4, 17, 18, 31, 33, 43, 44, 251, 253).

Petitioners contend that by reason of respondent's delay in filing his claim for compensation, he lost such right. It is firmly established by the fed-

eral decisions, construing the section of the Longshoremen's Act under consideration, that the requirement that a claim for compensation be filed within one year after injury is mandatory and jurisdictional.

This question was treated exhaustively in the case of *Young v. Hoage* (App. D.C.) 90 F. (2d) 395. In that case the claim was not filed within one year after the employee's death. The court said (pages 397 and 400):

"Section 13 * * * is mandatory, and gives no discretion to the commissioner, but provides in plain words that failure to file a claim within a year shall be an absolute bar to recovery—except where objection to such failure (under section 13(b)) is not made at the first hearing. *It is therefore jurisdictional.*

* * * * *

It is enough to say, we think, that the rule is established that, where a statute gives a right of the character in question—a right unknown to the common law—and limits the time within which an action shall be brought to assert it, the limitation defines and controls the right. *William Danzer & Co. v. Gulf R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126. In that view the objection made here is jurisdictional, and here there are no equities which we can properly consider."

Kobilkin v. Pillsbury (9th Cir) 103 F. (2d) 667 (affirmed by Supreme Court of the United States by an equally divided court, 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 983).

Romaniuk v. Locke (D.C.N.Y.) 3 F. Supp. 529, 530.

Dawson v. Jahneke Drydock (D.C.La.) 33 F. Supp. 668, Syll. 7.

Liberty Mut. Ins. Co. v. Parker (D.C.Md.) 19 F. Supp. 686.

Morgan v. Harrison (App. D.C.) 91 F. (2d) 310, 312.

Point II.

If the claim of a workman for compensation is not filed within the period provided for by the Longshoremen's and Harbor Workers' Compensation Act it is lost, and pleas of waiver and estoppel are of no avail.

As said by Judge Mathews in the case of Hilty v. Fairbanks Exploration Co. (9th Cir.) 82 F. (2d) 77, 79, in referring to a similar provision in the Alaska Workmen's Compensation Act:

"The limitation therein prescribed goes not merely to the remedy, but to the right of action created by the act. * * The requirement that action be commenced within two years is a limitation upon the right, not a mere limitation upon the remedy. This requirement is absolute and unconditional. If the action is not commenced within two years, there is no right of action, and pleas of ignorance, concealment, misrepresentation, and fraud are of no avail."

See, also: William Danzer Co. v. Gulf R. R. Company, 268 U. S. 633, 636; Rogulj v. Alaska Gastineau Mining Co. (9th Cir.) 288 F. 549, 551; Taylor v. American Employers' Ins. Co., 35 New Mexico 544, 3 P. (2d) 76, Syll. 1; Walsh v. A. Waldron &

Sons, 112 Conn. 579, 153 Atl. 298; Petraska v. National Acme Co., 95 Vermont 76, 80, 113 Atl. 536, 538; Rosell v. State Industrial Accident Comm., 164 Or. 173, 192, 95 P. (2d) 727, 734.

Point III.

Where an employer or its insurance carrier offers compensation to an injured employee, who refuses such offer, the employee must file his claim for compensation within a year after his injury or it will be barred under the provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), and the running of such time limit is not deferred until the continuing offer is withdrawn or the right to further payment controverted.

In the case at bar the employer's insurance carrier on numerous occasions during the year immediately following respondent's injury endeavored to induce him to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 141, 142, 161, 174, 192, 219, 221, 226). Respondent, who was in contact with his various lawyers (R. 138, 139, 144, 155, 156, 172, 201, 225, 227) steadfastly refused to accept compensation, either because he did not feel that the offer was high enough (R. 136, 144, 150) or because upon advise of his lawyers he thought he could break the said Compensation Act (R. 227, 228) or because he thought he had a third party claim (R. 170, 193)

or because he was insisting that a lump sum settlement be made (R. 152, 158, 170).

In the prevailing opinion of the Circuit Court of Appeals in the present case (R. 283), the court lays stress upon the fact that the petitioning insurance carrier had offered respondent compensation payments "until at least as late as the end of April, 1936, and perhaps much longer." The said court in its prevailing opinion then goes on to say (R. 283, 284) :

"The representative of the carrier in immediate charge of the case thought that the disability was probably terminated several months prior to September 1936, but the precise date of the supposed termination is not stated. No intimation of this belief was conveyed at the time either to the commissioner or to appellee. When asked why a controversial was not filed with the deputy commissioner because of the supposed recovery, this witness stated that there was no reason to file a controversial and that he did not understand that a report controverting the claim was due. The explanation of this attitude appears to lie in the fact that appellee was declining to accept the compensation tendered, asserting that his prior earnings entitled him to a larger weekly sum or that he would prefer a lump sum settlement. In short, the carrier appears to have assumed that under the circumstances it was entitled to defer controverting liability until a formal claim was filed; and it is to be gathered that the deputy commissioner was of the same opinion."

The Circuit Court in its opinion fails to mention the fact that respondent also refused to accept compensation because he was advised he could break the Compensation Act (R. 227, 228) and also because he was claiming that he had a third party action or a direct action against his employer (R. 170, 193), and that he informed Mr. Pickett he was not going to accept compensation (R. 170). Further, though he was given every opportunity to do so, he failed to offer any proof that the amount of compensation offered to him was less than he was entitled to (R. 136, 145, 150).

Assuming, however, that the representative of the insurance carrier did think that respondent's disability was probably terminated several months prior to September, 1936, how was the carrier to get rid of respondent's right to compensation during the time the carrier admitted he was disabled? Certainly the carrier could not have defeated respondent's right to compensation for such period by filing a controversial prior to the expiration of a year after his injury. Under the express provisions of Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)), respondent had a year after his injury within which to file his claim for compensation.

Even though the representative of the insurance carrier did feel that the respondent's disability was probably terminated in the summer of 1936, the fact that no controversial was filed during 1936

would not extend the time during which the respondent must file his claim for compensation with the Deputy Commissioner. If the respondent had filed his claim for compensation within the year period following his injury, then the fact that the insurance carrier had failed to file a controversial might be some evidence against a claim of the carrier that the disability of the respondent had previously terminated. However, the fact that the insurance carrier did not file a controversial claiming that respondent's disability had terminated did not preclude it from controverting respondent's claim upon the ground that it was not filed with the deputy commissioner within the year period provided by Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)). The only way in which the right to controvert the failure to file the claim within the statutory period could be waived under the Act was by failing to object to such failure at the first hearing before the Deputy Commissioner, Section 13(b) of the Compensation Act (33 U.S.C.A., Sec. 913(b)).

The question under consideration was passed upon by the Court of Appeals for the District of Columbia in the case of *Fulton v. Hoage*, 77 F. (2d) 110, 112. In that case the employer contended that the claim of the injured employee should be rejected because it was not filed within one year after the alleged injury of the employee, as required by Section 13(a) of the Compensation Act. On the other

hand, the employee contended that the employer was prevented from making the defense that the claim for compensation had not been filed in time by reason of the fact that the employer had not filed a notice of controversial, as required by Section 14(d) of the said Act (33 U.S.C.A., Sec. 914(d)). Chief Justice Martin in disposing of the question said (page 112) :

"It is contended by plaintiff's counsel that the failure to file such notice (of controversial) forecloses the defendants from making any defense against plaintiff's claim, and establishes the claim as a 'vested right' to compensation in the plaintiff. We cannot sustain this contention, for in our opinion the plaintiff nevertheless was bound to file her claim for compensation within a year after the date of her injury as required by section 13, supra."

In this connection, we also call the Court's attention to the case of *Andress v. Art Metal Const. Co.*, 211 N. Y. Supp. 752, where the court had before it a statute similar to the one under consideration in this case. In the *Andress Case*, Syll. 1, it was held :

"Failure of employer or insurance carrier desiring to contest death claim to file notice of controversy required by Workmen's Compensation Law, Sec. 25, as amended * * does not operate as a waiver of all right to contest claim except question of dependency, in view of sections * * 28 * *."

The court, in its opinion in the foregoing case, further said (page 754) :

"The purpose of section 25, supra, in providing for filing of a notice of controversy, *was to expedite the trial of the cases*, but the remedy of the board is to require the filing of the notice or its equivalent, not to declare a forfeiture not fixed by the statute. * * So, too, in section 28 of the statute, it is provided that failure to file a claim within one year shall bar the right to claim compensation unless waived by failure to raise the objection on the hearing."

The Act before us contains provisions similar to those contained in the enactment under consideration in the foregoing case. Section 14 of the Longshoremen' Act (33 U.S.C.A., Sec. 914) requires the filing of a controversial in certain instances; Section (13(a) of said Act (33 U.S.C.A., Sec. 913(a)) requires that compensation claims be filed within one year after employee's injury, while Section 13(b) of the Act provides that failure to file a claim within the period prescribed shall not be a bar "unless objection is made to such failure at the first hearing" etc. (See page 279 of the record for pertinent portions of Sec. 13 of said Act and pages 285-287 of the record for pertinent portions of Sec. 14 of said Act). In the instant case, respondent's claim was controverted by the employer and the insurance carrier on the ground that it was not filed within the statutory time (R. 259-262). Also at the first hearing on respondent's alleged claim, a like objection was made thereto (R. 210). This is all that was required by the Act. Dawson v. Jahncke (D.C. La.) 33 F. Supp. 668-670).

In the prevailing opinion in the Circuit Court in the instant case, it was also said:

"By a parity of reasoning where, as here, there is a continuing offer amounting to a tender of compensation based on a condition of total disability, the employee is entitled to assume that the carrier holds itself in readiness to pay the sum periodically offered; and that he may dispense with the filing of a claim so long as that situation persists. We think, therefore, that the time limit prescribed by 13(a) applies not only to cases where compensation is actually paid, but to situations where the statutory compensation is tendered; and that the time limit does not commence to run until the continuing offer is withdrawn or the right to further payment controverted. For the purpose of the limitation, tender must be held the equivalent of payment."

It should be borne in mind that Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)) provides that claims for compensation "shall be barred unless a claim therefor is filed within one year after the injury," except "if *payment of compensation* has been made without an award on account of such injury * * a claim may be filed within one year after the date of last payment." Therefore, the only way in which the time for filing a claim for compensation may be extended under the Act is by the *payment of compensation*." In the present instance no such payment was made. The respondent refused to accept compensation at all times until after the expiration of the year following his injury for any one of four reasons, as we

have shown above.

Can it be said that because the insurance carrier in the present instance offered to pay the respondent compensation, which offer was rejected by respondent for reasons of his own, that such offer constituted "a payment of compensation" within the meaning of Section 13(a) of said Compensation Act (33 U.S.C.A., Sec. 913(a)) ?

What does the word "payment" mean? In *Bronson v. Rodes*, 74 U. S. 229, 250, 19 L. Ed. 141, 146, the court said that "Payment of money is delivery by the debtor to the creditor of the amount due." There was no delivery of any money in the present instance. Hence, there was no payment of compensation.

Also in *Bailey v. Commissioner of Internal Revenue* (C.C.A. 5) 103 F. (2d) 448, 449, the court said:

"A payment does not occur unless 'the money passes from the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.' 21 R.C.L., Payment, Sec. 3."

In 62 C. J., Tender, page 656, the rule is thus stated:

"The difference between payment and tender is broad and clear. Payment implies an acceptance and appropriation of that which is offered by one party to the other, whereas tender is the act of one party, in offering that which he admits to be due and owing, but which is not accepted by the creditor."

In *Rogers v. Joplin & P. Ry. Co.*, 115 Kan. 815, 818, 225 P. 108, 110, the court said:

"Did the statement of Fennimore, the defendant's assistant manager to plaintiff, 'that when plaintiff wanted any compensation or assistance 'to let him know,' amount to a waiver of demand for compensation? We think not."

Also in *Klein v. McCullough*, 135 Kan. 593, 596, 11 P. (2d) 983, 984, an injured employee failed to serve a written notice of claim on his employer within the time required by the Compensation Act of Kansas. The court said:

"There was testimony that while the claimant was in the hospital his employer called on him and they talked about compensation:

'Q. Did you ask him for compensation?

A. I asked him if there was any compensation on that and he said 'Yes.'"

The court in the foregoing case held that the claim of the employee was barred because he had failed to comply "with the statutory prerequisite of a timely written demand for compensation."

In this connection, we feel that the statement of Judge Haney of the Circuit Court in his dissenting opinion is the only logical construction to place upon the statute under consideration. Judge Haney said (R. 288):

"The effect of the majority opinion is to amend the statute so that the one-year period runs from the date of the 'last tender' rather than from the date of the 'injury' as is specified in the statute. The result of such amend-

ment is to open, for each claimant, a way to indefinitely suspend the statute by merely failing to accept a tender. Such construction does not contribute to 'prompt' disposition of the matter, an aim said in the majority opinion to be desired.

The majority further says: 'For the purpose of the limitation, tender must be held the equivalent of payment.' How there can be payment of a claim, the amount of which is not yet determined, is not clear."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the questions here involved may be permanently settled by this Honorable Court and a proper construction and interpretation made, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the said United States Circuit Court of Appeals for the Ninth Circuit, and finally reverse it.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th
Compensation District, U. S. Employees Com-
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SURANCE COMPANY, a corporation, CHAS.
R. McCORMICK LUMBER COMPANY OF
DELAWARE, a corporation, and McCORMICK
STEAMSHIP COMPANY, a corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

BRIEF OF RESPONDENT

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Respondent.

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Gus Pletz, a longshoreman by occupation, was working on the SS. West Planter, belonging to the McCormick Steamship Company. On November 12, 1935, this vessel was berthed at the McCormick Terminal in the city of Portland. Pletz was working in a hatch, assisting in loading cargo, when an oil drum fell out of the sling and struck him on the shoulder

and back, causing him to sustain personal injuries. He was immediately taken to St. Vincent's Hospital and placed under the care of Dr. L. V. Belknap. Dr. Belknap was not only consulting physician for the McCormick Steamship Company, but was also physician for the insurance carrier under the Longshoremen's and Harbor Workers' Compensation Act, the Fireman's Fund Insurance Company.

Three days after the accident, Wendell Gray, Esq., an attorney and an assistant in the office of Messrs. Raffety & Pickett, claim agents for the insurance carrier, called on Mr. Pletz at the hospital, and Mr. Pletz testified at the hearing before the Deputy Commissioner; "and I couldn't speak, so he said he come back eight days later."

The purpose of Mr. Gray's visit was to obtain a statement of the facts of the accident, and to secure an acceptance of the compensation benefits due Mr. Pletz under the Harbor Workers' Act. The fact of this call and the discussions which took place between Pletz and Mr. Gray become significant as bearing upon the question at this time of planting in Pletz's mind that the representative of the McCormick Steamship Company was solicitous about him, and this was increased by the inquiries said to have been made by one Charley Rudberg, a superintendent of the McCormick Steamship Company, who was said to be "inquiring about me all the time in the hospital." Mr. Gray, however, was not successful in securing the statement at this time owing to the debilitated condition of Mr. Pletz.

Mr. Gray returned in about eight days and wrote out a statement of how the accident occurred, and Mr. Pletz signed it, and Mr. Gray took it away with him. This statement was signed on November 15, 1935, and is appellee's Exhibit 1, found on page 231 of the Apostles. After identifying Pletz as the individual who was injured and reciting certain facts that showed that a slingboard had been overloaded by the longshoremen, the statement concludes with this statement:

"The winches were working all right and the winch driver was handling the winches carefully and properly. The cause of the accident was due to placing one too many drums on the slingboard. That was the second load of six drums."

Mr. Gray was called as a witness and identified the statement and related the circumstances under which it was signed. He testified, "My employment consisted in investigating these cases,—Yes, longshoremen's cases." He testified that he was notified by the McCormick Steamship Company of the accident, and that he went to the hospital and interviewed Pletz, and that he had two purposes for interviewing him. One was to ascertain the nature of his injury, and the other to ascertain whether or not there existed what is known as a third party claim.

On the second visit, about the 15th of November, 1935, Mr. Gray had a check made out for the amount of compensation that was payable to Pletz on account of this accident. The following appears in the transcript: (A. 218)

"A. Well, I don't know, he said, 'I am willing to advance you money if you need some, and I asked him how much he was going to get me, and he said fourteen dollars, and I don't know now whether it was forty cents or twenty cents.'"

Pletz was released from the hospital after a few weeks of convalescence, and he called at Mr. Pickett's office, which was located in the Mead Building. The following appears on pages 219 and 220 of the Transcript:

"Q. And what did Mr. Pickett say?

A. Well, he was going to give me the compensation. 'Well,' I said, 'I knowed that some guys get up to twenty dollars and so on, and I think that fourteen dollars was not enough.' * * * *

Q. Did you make repeated efforts to get your compensation refixed or not?

A. Yes, I tried to, and I was asking Mr. Pickett if he could get some kind of an agreement. I did need money, but I didn't want to let the doctor go. Mr. Pickett said he was willing, he would rather make a settlement with me than pay me the compensation."

From the foregoing testimony it will be seen that several months transpired and Pletz had not been paid compensation, although the insurance carrier was willing to pay it. During this period the claim attorney was loaning Pletz money to get along on.

Under the rules and regulations of the U. S. Employees' Compensation Commission, compensation matters arising under the Act are transacted by established procedure, and forms are furnished to employers to transmit to the Deputy Commissioner for

the district. These approved forms were used in this instance. On page 235 of the Apostles there appears "EMPLOYERS FIRST REPORT TO DEPUTY COMMISSIONER OF ACCIDENT." This was filed on November 15, 1935. It sets forth the name of the employer and of the vessel upon which work was being performed, office address, name of insurance carrier, name, address and age of the injured employee, and the circumstances of the accident covering such questions as "Has he returned to work?" "Was medical attention authorized?" "Names of foremen?" "Extent of injury, etc." This notice was enclosed with a letter of transmittal to the Deputy Commissioner under date of November 12, 1935, stating that Form 202, First Notice of Accident, was enclosed, and proceeding then to say:

"The foregoing notice pertains to a *claim of G. Pletz against the SS. WEST PLANTER* This claim arises out of an accident that occurred November 12th at Portland, Oregon, on board the SS. West Planter." (T. 238) (*Italics ours.*)

The next form was "ATTENDING PHYSICIAN'S REPORT." This form contains 19 questions to be answered by the attending physician, among which is an interrogatory as to the extent of the disability and an estimate of when he would be returned to work, and an explanation of the educational background of the attending physician. This report was dated November 19, 1935, and appears on pages 239 and 240 of the Apostles.

"NOTICE TO THE DEPUTY COMMISSIONER THAT PAYMENT OF COMPENSATION HAS BEGUN WITHOUT AWAITING AWARD" is another form required by the Commission, and it was filed with the Deputy Commissioner on November 26, 1935. This form gives notice of the name and address of the employer, and the name of the vessel, and place of accident, name and address of injured employee, date of accident, and states that "Compensation is to be paid to G. Pletz." (Tr. 241:2) This is followed by a computation of the "compensation rate." It shows that Pletz's earnings were \$1109.82 for the preceding year, "divided by 42—average weekly wage 21.34 multiplied by 2/3—compensation rate, \$14.23."

"8. Compensation shall be payable from the 20th day of November, 1935, until notice is given the Deputy Commissioner that payment has been stopped or suspended." (T. 242)

"9. Date of first payment Nov. 26, 1935." (T. 242)

On November 26, 1935, a letter of transmittal of this notice that compensation would be paid without awaiting award was mailed to the Deputy Commissioner. It is found on page 243 of the Transcript, and so far as is material herein, states as follows:

"The foregoing notice pertains to the claim of G. Pletz against the SS. West Planter and/or McCormick Steamship Co. This man's disability began November 13th and eliminating the waiting period, compensation is payable from November 20th.

"We ascertain from the Longshoremen's Hall that this workman's earnings averaged \$21.34 per week. This entitled him to compensation at \$14.23 per week. We are paying him at this rate.

(Signed) David C. Pickett."

On December 4, 1935, Mr. Pickett wrote the following letter to the Deputy Commissioner, (T. 244) :

"We have tendered compensation to Mr. Pletz on account of the injury which he received November 12, 1935, while employed on the SS West Planter, but he has refused to accept the same."

On January 10, 1936, the Deputy Commissioner wrote Mr. Pickett as follows, (T. 245) :

"When claimant is finally discharged from treatment by the attending physician, kindly submit supplementary medical report with special reference to permanent partial disability.

"If complete or adequate information cannot be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited."

On January 11, 1936, the Deputy Commissioner's letter is answered by Mr. Pickett, stating (T. 246) :

"On December 4, 1935, I addressed a communication to you stating that Mr. Pletz had refused to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act.

"Up to the present time Mr. Pletz has not accepted compensation." (Italics ours.)

It is to be noted that there are no communications between the Deputy Commissioner and Mr. Pickett in reference to this claim from December 4, 1935,

to November 5, 1936. Pletz having been injured on the 12th of November, 1935, it will be seen that the Deputy Commissioner's inquiry came within the year. On November 5, 1936, the Deputy Commissioner wrote to Mr. Pickett the following letter, (T. 247):

"This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise as to the present status of the matter."

Mr. Pickett answered this letter, but no mention is made of the fact that Pletz had not been accepting compensation or that continuing offers of payment of compensation were made. The letter is dated November 6, 1936, and is significant because it shows that Pletz was receiving medical aid from the insurance carrier, and that he had been recently submitted to a specialist for the purpose of seeing if an improvement of his physical condition could not be secured. The letter is as follows (T. 247-8):

"I have your letter of November 5, 1936. This is to advise you that at the present time Mr. Pletz claims to be suffering from certain subjective symptoms. The doctors by whom I have had him examined and under whose treatment he has been have been unable to find any objective symptoms, and have advised me that he is not really disabled. Recently, however, I put him under the care of Dr. Leon Goldsmith with a request to Dr. Goldsmith to examine him thoroughly with the view of determining his true physical condition. I have not had a report from Dr. Goldsmith.

(Signed) David C. Pickett."

The next proceeding before the Deputy Commissioner is a request for additional reports, under date of March 2, 1937, and is found on pages 248 and 249 of the Transcript. The letter is as follows:

"Will you kindly refer to the case of G. Pletz injured on 11-12-35, while in the employ of McCormick Lbr. SS. West Planter, and furnish the following reports? We should be glad to be advised as to the status of the matter subsequent to your letter of Nov. 6, 1937.

"If complete or adequate information cannot be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited."

The answer thereto is under date of March 8, 1937, and is as follows, (T. 249, 250) :

"I have your inquiry of March 2, 1937, inquiring as to the status of this claim subsequent to our letter of November 6, 1936. I beg to state that this man still claims to be suffering from disability resulting from the accident. None of the doctors to whom I have sent him can verify his claims of disability. *From my conversation with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and to secure from me an agreement for perpetual medical care.*" (Italics ours.)

The next proceeding is a claim dated April 19, 1937 in which Pletz files a claim for compensation on one of the Commission's forms, entitled "EMPLOYEE'S CLAIM FOR COMPENSATION" and states the circumstances of the accident.

This claim was prepared on the form blanks filled out by Mr. Pickett, and transmitted to the Deputy Commissioner from Mr. Pickett's office. In connection with the filing of this claim, the following appears:

"... I was asking Mr. Pickett that I had better take the compensation, because it will take a long time until I can work. And Mr. Pickett says, 'You wait for a while, you might get a little better when it gets warmer.' So I did let it go another couple of months, and then I did come up and insist that I wanted compensation, and then Mr. Pickett told me I had to file a claim with Mr. Marshall.

Q. Now when was this, Gus?

A. Well, it was about a day before I seen you.

Q. Did you send a claim in?

A. Yes, Mr. Pickett in the office fixed it up for me.

Q. Wait a second,—this claim that you really sent in was sent in by our office, was it not?

A. No, it was sent in by Mr. Pickett.

MR. LORD: Is that right, Dave?

MR. PICKETT: It was made out for him by our girl and mailed by him." (T. 223)

On May 6, 1937, the insurance carrier for the employer filed with the Deputy Commissioner, on a prepared form a "NOTICE TO DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED." The reasons for filing the controversial are stated as follows:

"1. Because no payments of compensation were made in this claim and the claimant did not file a claim for compensation within one year after the date of the injury, as prescribed by subdivision (a), Section 13, of the Longshoremen's and Harbor Workers' Compensation Act.

**"(a) Because the alleged disabilities do not result from the accident."
for such other reasons as may later appear." (T. 260)**

There is also a Notice of Controversial shown on pages 261 and 262 of the Apostles, which is a reiteration of the reasons for resisting any further proceedings in connection with the claim.

The Apostles disclose what took place between Pletz, the claimant, and the representatives of the insurance carrier, and inasmuch as there are no contradictions to the testimony, the writer of this brief is of the opinion that certain facts can be assumed as being conclusively established as true:

1. That the representatives of the insurance carrier immediately commenced to look after Pletz by telling him that they would loan him money if he needed money, and this before compensation was due, (T. 218) and during the pendency of the claim did loan him money.

Subsequent to March 13, 1936, until July 23, 1937, interminable discussions, interviews and negotiations relating to the workman's disabilities and claim for compensation were carried on between the insurance carrier's attorney and the workman, and medical services were rendered without dissent during this period.

2. That every possible consideration was being shown Pletz both by the representatives of the insurance carrier and the attending physicians, and this treatment continued up until the 23d of July, 1937.

Pletz was taken to St. Vincent's Hospital from the place of the accident by the employer, (T. 212-213). He was confined to the hospital for about six weeks. Dr. Sabin was called in, as well as Dr. L. V. Belknap, (T. 213). After being in the hospital about six weeks he was sent to Dr. Harry C. Blair, who advised a surgical operation, (T. 213). Pletz submitted to this operation and was confined to the hospital from February 12 to March 13, 1936. (T. 213-14). The man was suffering from neurasthenia, (T. 214) :

Medical treatment and advice was being given him continuously from his discharge from the hospital on March 13, 1936; to the date of the first hearing (July 23, 1937), (T. 214-15) :

3. There were continued discussions between Mr. Pickett and Pletz regarding the payment of compensation, and the question of so-called third party liability, and these discussions continued between the parties long after November 12, 1936. There were discussions in relation to a lump sum settlement of the claim. (It is to be noted that under the Harbor Workers' Act with the approval of the Deputy Commissioner, a lump sum settlement may be made,—Sec. 14, Subd. (j).) The entire transcript of testimony discloses that Pletz was continually and persistently conferring with Mr. Pickett in relation to his claim, from March 14th forward, and that he had called on Mr. Pickett at his office frequently between the latter part of December, 1935, and February 13, 1936; (T. 218). Pletz's testi-

mony on page 220, previously quoted, is uncontradicted that Mr. Pickett—

“was willing, he would rather make a settlement with me than pay me the compensation.

Q. Now, by settlement, Gus?

A. Well, he was going to give me a lump sum, but it should be final.

Q. Final? A. Yes.

Q. And did Mr. Pickett tell you he couldn't do that?

A. No, he said himself he would better like to settle it than pay me compensation.” (T. 220)

Throughout the record it is shown that the money payments of compensation were never refused Pletz, and undoubtedly Pletz entertained the idea induced by the carrier's claim attorney, that he could have compensation at the rate of \$14.23, to be accepted by him at any time he desired to take it, and long after November 12, 1936.

This is exemplified in the testimony of Pletz found on pages 221 and 222 of the Transcript.

The only conflict in the testimony is on an immaterial issue and that is whether or not Pletz was contemplating filing a suit against the ship to recover damages on account of unseaworthiness. Pletz claims that he never threatened to bring suit, that he knew that from the start, that he was informed that he had no personal claim against the vessel. Mr. Pickett claimed that Pletz had in view a right of action to recover indemnifying damages rather than compensation.

ARGUMENT

The doctrines of waiver and estoppel have uniformly been held applicable to acts of the type of the Harbor Workers' Act, and all substantial evidence in this case calls for the application of these doctrines.

Riverside Mills Co. vs. Parsons (Tenn.) 141 S. W. (2d) 895.

Harrison vs. McCarty, 13 A. 544.

Young v. Hoage, 90 F. (2d) 395.

American Mutual Liability Ins. Co. v. Hamilton, 145 Va. 391, 135 S.E. 21.

Vester Gas Range & Mfg. Co. v. Leonard, 146 Tenn. 665, 257 S.W. 395.

Smith v. Heine Safety Boiler Co., 119 Me. 553, 112 A. 516.

Curtis v. Slater Constr. Co., 194 Mich. 259, 160 N.W. 659.

Lindblom v. Employers' Liability Assur. Corp., 88 Mont. 488, 295 P. 1007.

Crane Enamelware Co. v. Dotson, 152 Tenn. 401, 277 S.W. 902.

Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P. 413.

Halverhout v. Southwestern Mill Co., 97 Kans. 484, 155 P. 916.

The workmen's compensation acts of different states are dissimilar in operation. The acts of many states set up a quasi-judicial tribunal and make provision that practically every step taken by the injured

workman is subject to the determination of a public official. The Commission makes rulings and orders which have the effect of official determinations, but as far as the claimant undertaking to negotiate with the Commission with respect to his disabilities, he is unable to do so. The courts, in construing such workmen's compensation acts, have in many cases held that members of the Commission are acting under statutory authority and a compliance with the statute is mandatory and jurisdictional, and any dealings with the claimant outside of the provisions of the statute are extra-jurisdictional. Consequently the filing of a claim within time limits has frequently been held jurisdictional, and it is expressly held that the doctrines of estoppel and waiver cannot be applied to the acts of the officials whose duty it is to administer such acts. Of course, it is a familiar principle of law that the doctrine of estoppel and waiver does not apply to the acts of public officials. Some courts, however, have refused to treat this type of act any different than if the Act was an insurance coverage with a private insurance corporation, and hence construe the provisions relating to the notice of injury and the filing of claims the same as such provisions would be construed if found in any accident insurance policy.

The decisions construing the state acts are found in an annotation in 78 A.L.R., 1306 et seq.

There is another set of workmen's compensation acts which provide that an employer shall secure a policy of insurance against accidental injury to his

employees with an insurance company. Provision is made that in event of any dispute between the injured employee and the insurance carrier, the dispute shall be submitted to a commissioner, who is a public functionary. Under such acts the employee and the agents of the insurance carrier may adjust their differences to suit their own conveniences, and as long as there is no dispute there is no resort to the commissioner.

The procedure regarding the proof of claim for an injured employee under the Harbor Workers' Compensation Act is entirely different than under the type of act where a quasi judicial tribunal administers the entire proceedings relating to the claim. While the Act is administered by public officials, i. e., the U. S. Employees Compensation Commission and a deputy commissioner who has charge of the administration of the Act in a geographical district, yet the duties of the Commission in general do not involve the disbursement of public funds, nor is there any special fund created by the terms of the Act with which to pay claimants benefits for disabilities; nor is there any procedure for the collection of premiums from employers, or for the creation of a fund, so the construction of acts containing analogous provisions to the Oregon and Washington Acts, for example, are of no aid to this Court in determining the liability in this case.

This is well illustrated in the case of *Rohde v. State Industrial Accident Commission*, 108 Ore. 426, 217 P. 627, where an effort was made to file a claim for com-

pensation benefits several years after the three-month limitation fixed in the Act for filing claims had expired, on the grounds that Rohde had, by mistake of law, pursued a wrong remedy, and the representations made by him to the Commission prior to the expiration of three months were insufficient upon which to predicate the claim. Says the Court:

"Some precedents are cited on behalf of the claimant from Michigan, New Hampshire, Maine, and Illinois on the subject of waiver, with the deduction that, because the Commission acknowledged receipt of the paper by means of the postal card, it waived the filing of a proper application. *In all of those states the employer is required to pay compensation directly to the injured employee or to secure the same by insurance at the employer's expense.* Under those statutes it is a question directly between the employee and his employer. The latter, being in propria persona, can of course waive any formality required by the statute, as it is a personal right," (Italics ours.)

We need not pursue such acts further because it is apparent there is a distinguishing feature in the statutes where the employer or insurance carrier is charged with the furnishing of medical services, hospitalization and the payment of fixed sums of money, as opposed to those statutes which provide for the administration of a fund collected from all employers, and which is placed in a segregated fund, from which claims are not paid until proven by the claimant as the result of a claim presented and filed, and doctors and hospital services are furnished by the Commission.

There are but few states where there are similar statutes. It has been said by the United States courts that the Harbor Workers' Compensation Act was borrowed from the Compensation Act of New York, and that the decisions of that state, construing the act, are to be accorded the usual binding force of borrowed statutes.

Consequently, in consideration of this case, the decisions construing statutes affected with the disbursement of a segregated fund should not be considered of any binding force because in those cases there are no dealings or negotiations between the claimant and the commission which could give rise to the application of the defenses of waiver and estoppel. This is the *rationale* of the decisions construing such statutes and in the Rohde case it is pointed out that the doctrines of estoppel and waiver do not apply to public officers, and hence the discussions between members of the Commission or its employees and the claimant were in no sense binding, nor could they arise to the dignity of an estoppel. That rule does not apply in cases where the claimant deals and negotiates directly with the employer or his insurance carrier regarding the benefits which he is to receive, and the defenses of estoppel and waiver apply to their fullest extent. Therefore, in the consideration of this case it is important that consideration be given to the conduct of the claimant and the insurer regarding the claim, and we think it abundantly proved by the statement of facts in this case and the findings of the district court and practi-

cally adopted by the appellate court, that the conduct of the parties gave rise to the application of the doctrine of waiver or estoppel so far as any claim may be made that a formal claim was not filed within the period of one year from the date of the injury.

The filing of a claim with the Deputy Commissioner becomes necessary only where there is a controversy between the insurer and the employee, and the rights of the injured employee to receive the compensation is denied by the insurance carrier. The right to compensation is not predicated upon the filing of a claim by the injured employee. The necessity of filing a claim within the year arises only in cases where the employer has no knowledge of the injury, or in cases where a question might arise that the tort was of non-maritime origin, and such like instances, but in instances where the employer has knowledge of the accident, and notifies the Deputy Commissioner of the accident, and tenders compensation, then there is no occasion on the part of the injured employee to file a claim.

Now in this case the Deputy Commissioner was given notice that compensation was being paid Pletz without awaiting an award. Here we have dealings within a few hours after the accident, between the employee and the insurance carrier. Under Section 14 it was the mandatory duty of the employer to pay "promptly and directly to the person entitled thereto without an award, except where liability to pay compensation is controverted by the employer."

There is nothing in the Act, as far as the writer has been able to find, that defines the term 'award' or makes any provision for the making of an award by the Deputy Commissioner. Section 19 (a) gives the Commissioner full authority to hear and determine all questions in respect to claims filed by the claimant, and presumably this is the award referred to in Section 14, but it is difficult to understand the necessity of making a claim, except where the claimant desires some different action on the part of the insurance carrier, and tries to enforce what he may conceive to be his rights, that he is entitled to under the compensation act which will not be accorded him by the insurance carrier.

For instance, in this particular claim, the insurance carrier was obligated to pay compensation without any action on the part of either the claimant or the commissioner, and it was willing to do so. Claimant was of the opinion that the amount tendered him as compensation was less than he was entitled to receive under the Act. He could have at this instance filed a claim and had this question determined, or he could go on and accept the compensation and when the carrier stopped paying him compensation he could have filed a claim within one year from the date of the last payment. The point is that it was the duty of the carrier to pay him compensation, and if he does not accept the money, that does not say that he may not subsequently come along and claim it. It may be that Pletz did not care to have the money in his hands and

preferred to let it accumulate in the hands of the insurance carrier, and I think all that can be said in this case is that the compensation at the rate computed has accumulated in the hands of the carrier.

It is noticed that the carrier never filed a controversial. The letter of December 4, 1935, set out on page 7 of this brief, is not a controversial. All it says is that "We have tendered compensation to Mr. Pletz but he has refused to accept the same." This letter was not notice to the Deputy Commissioner that a formal controversial was being filed by the insurance carrier. Under Section 14 (c) and (d) *a formal notice on a form prescribed by the Commission* that compensation has either been suspended or the right to compensation has been controverted *was necessary*.

The fact of the matter was that the claim attorneys for the insurance carrier expected that Mr. Pletz would sooner or later accept the compensation. This assertion is corroborated by the letter of January 11, 1936, where Mr. Picket uses the following language, "Up to the present time Mr. Pletz has not accepted compensation." (T. 246)

On pages 259-260 of the Apostles is shown a sample of the form that is required to be filed. If payments were suspended or compensation was controverted, it was absolutely essential that this notice be given, and on a form prescribed by the Commission. This, then, would start the machinery in operation for the protection of the claimant's rights. After such notice had

been filed, it then became the duty to give the claimant notice that compensation would not be paid, and if claimant had any rights, to come forward and assert them before the Commission. That is the procedure contemplated by Section 14 (h). If the formal notice is not filed, there is nothing to put the machinery in operation, and hence there is no notice to the claimant or to the Deputy Commissioner that compensation will not be paid.

At any time that the insurance carrier deemed that Pletz had recovered, it was its duty, under this Act, to have notified the Deputy Commissioner that the last payment of compensation had been made, and the rating of lost function or disability rating had been made, and the amount of it.

Here we have a case where there was an injury to a member which could give rise to a rating for permanent partial disability. Under Section 14 (g) it became the absolute duty of the insurance carrier, if it believed that Pletz had recovered, to have filed such a notice with the Deputy Commissioner within sixteen days after the final payment of compensation. The giving of this notice and the notice of suspension of payments, or notice of controversial is essential under this Act on the part of the employer or his insurance carrier, if payment of compensation has commenced without the making of an award.

Now, under the uncontroverted evidence in this case, the claim attorneys, instead of taking this af-

firmative action, preferred to discuss matters with Pletz. We find the evidence shows beyond peradventure of doubt that before the compensation was due the claim attorneys were offering to loan Pletz money, that after he was released from the hospital during the month of December, 1935, he called at the office of one of the claim attorneys and discussed with him the question of the payment of compensation, and compensation was tendered him. It had previously been tendered him in the hospital. A statement relating to the circumstances of the accident had been taken and Pletz was coming to the claim attorney's office once or twice a week. Long before the period of one year expired discussions were going on relating to settlement of the case in one lump sum, and Mr. Pletz was discussing the question whether, if such settlement was made, there would be a provision for medical care in the future. In other words, there has been a course of dealing going on between the parties almost continuously for months, and long after the expiration of one year after the accident these proposed settlements were being discussed.

So it is very clear that neither the insurance carrier, Pletz nor the Deputy Commissioner had taken any steps towards preventing the insurance carrier from paying compensation "directly to the person entitled thereto without an award." Claimant and the insurance carrier were treating that the compensation was due and there was no objection to paying it, and under this Act, it was certainly the duty, if the carrier,

was not intending to pay the compensation and does not intend to pay it, to have taken affirmative action, and if it does not take affirmative action the compensation accumulates to the credit of the claimant. The Compensation Act contemplates that if the insurance carrier knows about the accident and has given notice of the accident, it shall take the affirmative action of paying compensation without any action on the part of the injured employee, and if it does not do this, it cannot assert that a claim for compensation has not been filed. The only necessity for filing a claim for compensation on the part of the injured employee is to accomplish something that the insurance carrier is not willing to do. So compensation in this case accumulated until the 6th day of May, 1937, the date upon which the insurance carrier filed a controversial, and thereafter until a hearing is had by Mr. Marshall and an award made by him.

The claim attorney and the claimant were in continuous conference. Apparently Mr. Pletz was suffering from shock and was continuously in attendance upon the claim attorney's office, asking this and expecting that. There were discussions about the amount of compensation that Mr. Pletz was entitled to receive, how it was computed, whether the books of the company were authentic. There were discussions about lump sum settlements which the claim attorney was powerless to grant without the approval of the Deputy Commissioner and the Commission. These were idle discussions but they were had. It is probable that

the lump sum settlement was something that the claim attorneys desired in order to rid themselves of the importunities of the claimant. The perpetual "medical care" seemed to be a stumbling block to any action being taken, but it was not insurmountable. Such dealings between the claimant and the insurance carrier amount to estoppel.

There is not a single decision under Acts similar to the Harbor Workers' Act that does not recognize that the doctrine of estoppel can be and ~~will be~~ applied. It is true that many of the cases use language which would seem to rule out this idea, but every decision that the writer has read has recognized that the doctrine of estoppel may be applied where the obligations to pay compensation are matters of private adjustment between the claimant and the carrier, subject to being reviewed in event of dissatisfaction by a Board. It is true that in many of the cases the courts have found that the claimed acts do not amount to an estoppel, but all the cases do hold that in a proper case the defense of estoppel will be applied.

This Act was under consideration in the case of *Young v. Hoage*, 90 F. (2d) 395, referred to *supra*. In that case no claim was filed, or thought of being filed, for over two years after the claimed accident. There were no medical services rendered to the employee, and no recognition of the claim in any way on the part of the employer or the insurance carrier. The claimant died as the result of chronic myocarditis. Claimant was the widow of an employee of a road

contractor who mashed two fingers on April 23, 1933, and lost no time from his work. On May 2d he died and death was caused from heart disease. On May 17, 1933, a letter was written notifying the deputy commissioner of the death of the employee, giving information to the effect that he injured two fingers "in line of duty." A copy of the letter was sent to the employer. No claim for compensation was made and the matter was not further discussed until October 4, 1935, when a letter was written adverting to the fact that now the claimant was in possession of information that the cause of death was connected with the injury to the fingers. Thereupon a claim was filed over two years after the accident, and the claim was rejected on the grounds that the claim had not been filed within the year after the date of the accident. The claim was rejected by the deputy commissioner and an appeal was taken. The court then goes on and quotes from the sections of the compensation act and ends up by saying that the correspondence quoted did not amount to the notice of a claim or the filing of a claim. The court reviews a number of cases and comes to the conclusion that the claim had not been filed within the time, and had outlawed.

But the court observed: "In that view the objection made here is jurisdictional, and here there are no equities which we can properly consider. . . . There is no intimation of entrapment or surprise." These last statements are very significant and intimate beyond peradventure of doubt that the court would

apply the doctrine of estoppel to the construction of the Harbor Workers' Act in event circumstances and facts warranted the application of that principle.

There are facts which stick out starkly and it must bring a blush of shame to esteemed counsel to urge the setting aside of the District Court's decree in this case. I just wonder how the insurance carrier can reconcile the refusal to pay this claim with ethical conduct on its part.

Take, for instance, the statement of Mr. Pickett to the effect that the medical reports show that this man should not be disabled for more than six weeks, and that in the month of August, 1936, he had thought for several months that Pletz had no disabling injury and he could just as well go back to work. Yet for months afterwards, and long after the expiration of the time for filing the claim, he was still talking about making a lump sum settlement, and asking the man what he would take. In other words he was just being strung along. It is very obvious that Mr. Pickett sought to arouse in the claimant's mind that he was going to get a lump sum settlement on account of his claim, sooner or later, and that he would get it as a result of the negotiations and discussions that he was carrying on with Mr. Pickett.

Again, Mr. Pickett's answer to Mr. Marshall's letter of November 5, 1936, which was written a few days before the expiration of the time within which to file a claim, is a monumental piece of cupidity. Mr. Mar-

shall says (T. 247) that the injured man had refused to accept compensation and asked for information as to the present status of the matter. Mr. Pickett's answer, found on page 247, does not say that the man is still refusing to accept compensation. He says the doctors have advised him that they are unable to find any objective symptoms, and that he "is not really disabled," and to reassure the Deputy Commissioner that the claim is in good standing, he goes on to say that he had placed him under the care of Dr. Goldsmith with a view of determining his true physical condition, and added that as yet he had not had a report from the doctor. The whole course of dealing between Mr. Pickett and Mr. Pletz, after Pletz had not accepted the compensation draft, was designed to overreach Pletz and string him along until his claim outlawed, and after it outlawed by limitation of time, Mr. Pickett was afraid to face the consequences, and then continued to string this poor deluded fellow along about making lump sum settlements with him.

Characteristic of the bad faith evidenced in the handling of this claim is to be found in the testimony of Dr. Paul B. Firth (page 121 of the Transcript). Pletz wanted to go to this man to see if chiropractic treatments would not be of benefit to him. This occurred in July, 1936, and Dr. Firth's services were not paid for. When Firth called upon Mr. Pickett to make payment, he was told that the insurance company had not made a settlement with Pletz and not to worry as the claim would be paid. In November he

again called Mr. Pickett and this time was requested to send an itemized statement. Dr. Firth stated that during all the months Mr. Pickett kept telling him that the case had not been settled, and that as soon as the case was settled he would pay the obligation to Firth. (T. 124) Upon further demand being made he was informed that the services were not satisfactory. He was never told that his claim would not be paid because the claim had outlawed. Eventually he sued Mr. Pickett to recover for the services for which Mr. Pickett had promised to pay, and of course he lost because he had sued the agent of a known and disclosed principal.

Possibly a true solution of the situation is to be gleaned from Mr. Pickett's testimony found on pages 181, 2, 3 of the Apostles:

"Mr. Pickett: Yes, it was. I should have written you a report on that, too, Mr. Marshall. There is one question Bill asked me the last time I was on that I don't think the answer was complete in it.

Q. What is that?

A. That is what interest I had in the case from a medical standpoint or otherwise when Mr. Pletz refused compensation, or the statute of limitations had run. Now we do have an interest there that I think to clear the whole thing I think possibly should be explained.

Q. I don't quite understand what you refer to.

A. It is a question you asked.

Q. As to the payment of the doctor bills?

A. No, your question was: Why was I interested in the case when he had refused compensation, or after the statute of limitations had run?

We do not have an interest to this extent that as soon as that accident occurred we are faced with three possible claims: one is a claim under the Longshoremen's and Harbor Workers' Act; the other is a possible third party claim; and the other is a possible suit against the employer in spite of the Act. Now it just happens that I represented the carriers that would have had to defend each one of these claims that he was presenting and he had determined to make a liability claim, and had been asking for a lump sum settlement, and if suit had been filed in either type of those liability claims I would have been involved in the defense of it. And therefore I was interested in the claim that he was pressing, and I was interested in the claim after the statute had run, not may be as a compensation claim, but as a liability claim. It was up to me to keep in touch with him as long as there was a danger of either of those claims being pressed.

Q. In other words, you figured there was a two year statute of limitations in respect to any claim he might make as to liability, either as a third party claim or as a direct claim against the McCormick Steamship Company?

A. There might be, yes, but at any rate we would have them to defend if he filed them.

Q. So that is why then you did continue to discuss it with him?

A. I was bound to discuss it with him as long as he was pressing any type of claim against any insurance company I represented.

Q. And you kept on discussing it with him until the controversial was filed, didn't you?

A. Yes, and until he had settled upon one claim he was going to press, I thought he had settled upon the liability claim long before that. As a matter of fact, he told me so and then when he came in and filed the formal claim then he was presenting a claim for compensation."

Yet he knew that any claim against the McCormick Steamship Company or third party claim was nothing more than such stuff as dreams are made on.

In the face of this record was there anything else for the trial judge to do but to say that there was no substantial or credible evidence that Pletz had not been imposed upon, and the company, by its dealings, should be estopped from asserting the bar of the statute of limitations?

Failure to file controversial as required by Section 14, together with the dealings between the claimant and the carrier, and failure to advise the Deputy Commissioner, constitute a waiver of notice of claim and holding of compensation for claimant's use.

Mackie v. School District, 234 Mich. 689, 209 N.W. 840.

Chelli v. American Boston Mfg. Co., 288 Mich. 441, 285 N.W. 14.

This was the view adopted by the Court of Appeals. The Court points out that Section 13-A of the Act applies only to cases where a controversial has been filed by the employer and that so long as the employer does not file a controversial there is no occasion for the employee to file a claim in a case like the one under consideration where the employer is not controverting the right of the employee to receive compensation, and is making a tender of compensation. This was plain

because under Section 14 of the Act it becomes the duty of the employer, when he has knowledge of the injury, to pay compensation on the fourteenth day thereafter, and upon the first payment of compensation the employer shall notify the Deputy Commissioner of the fact that payment has been made. It will be noticed by claimant's Exhibit 2 that the employer's report was filed on November 15, 1935, which was just three days after the accident, and it was stated that the employer had knowledge of the injury at the time and that medical attention by Dr. Belknap was authorized. This was transmitted by a letter of the employer's and carrier's attorney under date of November 18, 1935, and this was followed by attending physician's report on a form blank furnished by the Deputy Commissioner. If the employer or insurance carrier desires to reject the claim or if he decides the employee's disability has become stationary under subdivisions (c) and (d), it becomes the duty of the employer to notify the Deputy Commissioner that payment has been suspended or controverted.

The offer to pay compensation was purely voluntary on the part of the insurance carrier; that is, it was complying with statutory requirements which it had assumed. It had a right, if it cared to exercise it, to have filed a controversial, or reject the claim from the start. It may have been bad in principle for it to do so, but it could. Compensation was offered to be paid long after the expiration of one year from the date of the injury. This testimony has already

been referred to in our statement.

The claim attorney filled out Form 206 giving the Deputy Commissioner notice that payment of compensation to Pletz without an award had begun, and the accompanying notice, dated November 26, 1936 (T. 243) says: "We are paying him at this rate." The letter of December 4 states: "We have tendered compensation to Mr. Pletz," and on January 11, 1936, "Up to the present time Mr. Pletz has not accepted compensation." (T. 244) The Deputy Commissioner's letter of November 5, 1936, (T. 247) addressed to the claim attorney, is as follows:

"This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise us to the present status of the matter."

The answer, (T. 247-8) states that "Pletz claims to be suffering from certain subjective symptoms" and the doctors have advised "that he is not really disabled," and that he had put him under the care of another doctor who had not made a report. This reply did not give the information requested, as it omitted to give the information as to whether compensation was being paid Pletz. This was six days before one year had passed since the accident.

On March 2, 1937, the Deputy Commissioner forwarded a letter to the claim attorney on a form blank requesting information as to the status of the matter subsequent to the letter of November 6, 1936, and

with a further request that if information cannot be given on printed blanks, "kindly report by letter." (T. 248-9) On March 8, 1937, (T. 249-50) is the reply in which information is given that Pletz still claims to be suffering from disabilities, and "none of the doctors to whom I have sent him can verify his claim of disability," and he went on to say that "from my conversations with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and secure from me an agreement for perpetual medical care."

Now it will thus be seen that the insurance carrier at no stage of the proceedings on the claim before one year from the date of the injury gave the Deputy Commissioner any information that compensation was not being paid, but on the contrary he was led to believe until the claim for compensation was filed on April 19, 1937, that compensation was being paid. The letter of March 8, 1937 does not give any definite information that bi-monthly payments of compensation were not being made. The intimation of the letter of March 8, 1937, is that Pletz was feigning disability in order to secure a lump sum settlement and an agreement for medical care on account of injuries he had sustained. Now, of course the administration of the Act is under the U. S. Employees Compensation Commission, (Section 39), which is authorized to make rules and regulations. By Section 27 of the Act the Deputy Commissioner is given power "to do all things conformable to law which may be necessary to enable him effective-

ly to discharge the duties of his office," and by Section 22, as amended, the Commissioner may, upon his own initiative "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 19," and upon such investigation he has authority to take such steps in respect to the claim, or issue such orders as may be for the interest of the claimant or the carrier.

Under Section 14 it was the duty of the insurance carrier to pay the first installment at a fixed time after notice or knowledge of the injury, and it is further provided that compensation shall be thereafter paid semi-monthly except where the Deputy Commissioner determines otherwise. Under subdivision (d) of this section, if the employer did not intend to pay compensation, it was the duty of the employer to controvert the right to compensation by filing a written controversial with the Deputy Commissioner. This puts in motion the procedure which protects the claimant. He is given notice and by the filing of a claim a hearing is had. This the employer never did, and consequently the necessity of Pletz filing a claim for compensation did not come into existence or become consummate until such action was taken. In other words, the right to controvert payment of compensation by its own action was waived because the moment that the Deputy Commissioner had notice that the claim was going to be controverted, it became his duty to

notify the injured workman that compensation would not be paid, and thereupon Pletz had one year within which to file a claim upon which a hearing would be had, in accordance with the prescribed method of procedure. In other words, the Deputy Commissioner was led to believe that compensation was being paid and was never in fact notified that it was not being paid until April 19, 1937, or more than a year and five months after the injury had occurred.

The Court of Appeals took the view that the employer had either waived or dispensed with the filing of a claim by its own voluntary action, and by failing to file a controversial the time for the claimant to file a claim had not begun to run. While the Court cites no authorities to sustain its position, the cases cited above in the heading, construing the Michigan Act, clearly show that such construction is not without judicial precedent.

Clearly the only charitable view that can be taken of the matter is that the compensation was being held by the carrier for Pletz's use. On the other hand, it must not be lost sight of that the District Court made findings that did not exculpate the claim attorney, (T. 53) and the remarks of the court in rendering its opinion (T. 38), "Now there are some circumstances that are more disturbing than usual, and I feel that it is my duty, and justice demands, that I set aside the order, . . .," and the Court (Hon. Claude McColloch, Esq.) was charitable enough to suggest to counsel,

"but what findings I should or may make, or what expressions I shall put in the record other than what I am saying here . . .," characterize the dealings as designed to take advantage of a "man being to a degree, anyhow, a mental case, and that is established to my satisfaction," (T. 37) but some keen legal mind in the "home office" discovered there might be a legal "out" under the terms of Section 13, and the impasse that developed in Kobilkin's case, 103 F. (2d) 667, 309 U.S. 619, which was affirmed by this Court without opinion, the Court being equally divided, and hence the rejection of the claim.

Rendering of medical treatment is generally considered payment of compensation.

Industrial Comm. v. Globe Ind. Co., 218 P. 910-11.

Royal Ind. Co. v. Industrial Comm., 293 P. 342.

Thomas v. Baker Lockwood Mfg. Co., 163 S.W. (2d) 117.

Compensation is defined in Subdivision 12 of Section 2 of the Act as "the money allowance payable to an employee . . . as provided for in this Act, and includes funeral benefits provided therein."

It is difficult to see how this definition in fact excludes the usual rule that medical benefits are as much compensation as the money that is paid by way of indemnity payments.

It developed on the hearing that he was still undergoing treatment by the insurance carrier's physicians, and was still receiving regular treatment from the insurance carrier's physicians on the 23d day of July, 1937, which was the day upon which the hearing was taking place. This is shown on pages 220 and 221 of the Transcript. This evidence stands uncontradicted.

The Harbor Workers' Act provides in Section 7 (a) that the insurance carrier shall render this service, and provides that in event it is not rendered, the employee may contract it himself and the same shall be paid for by the insurance carrier. It also provides that the doctor for the employer shall furnish a report to the Deputy Commissioner within twenty days.

CONCLUSION

It is to be noted that Mr. Marshall did not make any specific findings. We have reference to the failure to make findings upon the effect of the negotiations between the parties, and the conduct of the parties attempting to reach a settlement, as tending to create a waiver of the filing of the formal claim by Pletz. Mr. Marshall followed a minority rule that the filing of a claim is jurisdictional, regardless of the conduct of the parties. The theory of these decisions is that compensation paid employees injured in industry is entirely unknown to the common law, and if there is a limit fixed as the time for the injured em-

ployee to act, the limitation controls the right. In other words, the time limit placed for filing a claim is placed upon the same plane by these courts and certainly in this case as found by two courts, the failure to file a controversial after payments had been tendered and to deal with the claimant on the basis that the claim was alive long after the one year limitation had expired and to make out the claim blank and mail it to the Deputy Commissioneh and to render medical service after the one year period constituted a waiver to claim that the one year limitation controlled.

BEN ANDERSON,

T. WALTER GILLARD,

WM. P. LORD,

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 93.—OCTOBER TERM, 1942.

Wm. A. Marshall, Deputy Commis-
sioner, 14th Compensation District,
U. S. Employees Compensation Com-
mission, et al., Petitioners,
vs.
G. Pletz.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Ninth Circuit.

[January 4, 1943.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The importance of questions presented in this case in the admin-
istration of the Longshoremen's and Harbor Workers' Compens-
ation Act,¹ as well as a conflict of decision,² impelled us to grant
certiorari.

The respondent, a longshoreman and maritime worker employed
by the petitioner McCormick Steamship Company in loading a
steamship, was injured November 12, 1935. He filed a claim before
the petitioner Marshall, a deputy commissioner, April 20, 1937.
The petitioner Fireman's Fund Insurance Company, which in-
sured the employer against liability arising under the Act, ap-
peared at the first hearing set by the deputy commissioner and
objected that the claim was untimely filed.³ The respondent
asserted that the insurer had, by conduct and negotiations with
him, waived the right to object to the claim on the ground stated.
After hearing witnesses the deputy commissioner made findings
of fact on which he based ultimate findings that the claim was
not filed within one year after the injury and that the respondent

¹ March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. c. 18.

² *Fulton v. Hoage*, 77 F. 2d 110.

³ § 13 of the Act (33 U. S. C. 913) provides: (a) "The right to com-
pensation for disability under this chapter shall be barred unless a claim
therefor is filed within one year after the injury, . . . except that if pay-
ment of compensation has been made without an award on account of such
injury . . . a claim may be filed within one year after the date of the
last payment"; and (b) that the bar shall not be effective unless objection
to the failure to file is made "at the first hearing of such claim in which all
parties in interest are given reasonable notice and opportunity to be heard."
There are other exceptions in paragraphs (c) and (d) which are here irrelevant.

had not been misled or overreached by the employer or the insurance carrier, and dismissed the claim.

The respondent filed his bill in the District Court praying that the order be set aside as "not in accordance with law."⁴ A motion to dismiss was filed and, after hearing, the court remanded the case to the deputy commissioner with instructions to make findings of fact upon all the issues involved and with leave to consider all the evidence already taken and any other further evidence which might be offered as a basis for such findings. Further evidence was taken, the deputy commissioner made detailed findings of fact, and again concluded that neither the employer nor the insurance carrier had misled the respondent and that neither the carrier nor the employer had waived, or estopped themselves to rely upon, the limitation set by the statute. Thereupon the respondent supplemented his bill and the petitioners moved to dismiss. The court heard the case upon the record certified by the deputy commissioner, but upon that record made its own independent findings of fact. Its conclusions, based on its findings, were that the insurance carrier was estopped to assert that the claim was not timely filed and had waived any defense on that ground. The court set aside the orders of the deputy commissioner and directed him to enter a further order rejecting the objections to the claim and holding it to be in all respects valid, and to proceed to ascertain the amount of compensation due the respondent.

The insurance carrier, the employer, and the deputy commissioner appealed to the Circuit Court of Appeals. That court affirmed the decision of the District Court, one judge dissenting.⁵

On the day of his injury respondent was sent to a hospital by the employer. He remained there until about Christmas 1935. A representative of the insurer called on him there, received a statement of his injury, and, within the time required by the statute, tendered him a check for the first installment of compensation due him, calculated according to his weekly earnings as nearly as the same could be ascertained from employment records. Respondent refused the check on the ground that it was not for as much as his earnings justified. It was explained to him that any deficiency could be adjusted as soon as the insurer or he could ascertain the facts more accurately. After leaving the

⁴ As permitted by § 21(b) of the Act, 33 U. S. C. 921(b).

⁵ 127 F. 2d 104.

hospital respondent called on the attorney of the insurer, was again tendered payment of compensation, and again refused it on the ground that it was inadequate. At that time the insurer had some supplementary information and, as a result, advised respondent that it was ready to pay him compensation at a rate slightly in excess of that originally offered.

After refusing compensation, the respondent consulted an attorney who advised him that he had a cause of action against his employer for damages, notwithstanding the provisions of the Compensation Act. He subsequently told the insurer's attorney that he had been so advised.

The respondent's disability necessitated a return to the hospital in February 1936. While there his present counsel saw him, advised him that he had no valid claims against any third party or his employer and that he ought to take compensation. On leaving the hospital respondent continued to receive medical aid which was furnished by the insurer as was all medical care theretofore.

Respondent repeatedly called upon the insurer's attorney who consistently advised him that he ought to accept compensation. There is dispute as to who broached the subject of a lump sum settlement in these conversations. Respondent says the attorney did. The latter insists that the respondent demanded such a settlement; that he explained that no such settlement could be made under the statute until all disability had terminated and the consent of the deputy commissioner had been secured. It seems to be agreed that the respondent repeatedly said he wanted a lump sum settlement with medical care for the indefinite future and it appears that the attorney insisted that no such settlement could be made.

Sometime in the summer of 1936 the respondent again discussed his case with his present counsel and was again advised that he should accept compensation. There is credible evidence that the respondent called on the deputy commissioner within a year of his injury, was informed that if the amount of compensation tendered him was not the proper amount this could easily be adjusted by reference to the rolls at the employment office and that he then told the deputy commissioner a lawyer had advised him he could disregard the compensation act and bring an action to recover for his injuries. Respondent insisted, however, that this conversation took place after the year had expired.

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The employer, or the insurer, promptly notified the deputy commissioner of the injury, that medical treatment was being furnished and compensation would be paid. Early in December of 1935 the insurer wrote the deputy commissioner that respondent had refused to accept compensation. In answer to an inquiry of the deputy commissioner, the insurer repeated this information in a letter dated January 10, 1936. There was no further correspondence in the matter until November 4, 1937, when the deputy commissioner inquired regarding the status of the case and was advised by the insurer's attorney that the respondent still claimed a disability, the existence of which the attorney doubted, but that respondent was receiving medical care, and seemed more interested in a lump sum settlement and perpetual medical care than in receiving compensation.

There seems to be no doubt that respondent and insurer's attorney talked repeatedly about the respondent's physical condition and the disposition of his case. There would seem to be little doubt on the evidence that he was repeatedly tendered compensation and refused it.

These are the facts in broad outline. It is unnecessary to recite the evidence in detail. What has been said indicates that issues of fact were presented and that there was substantial evidence to support the findings of the deputy commissioner.

First. The findings of the deputy commissioner supported his order. The District Court could not have set aside the order without retrying the issues of fact and making new and independent findings based upon its own appraisal of the evidence. But, under the overwhelming weight of authority in this and in the lower federal courts, the statute granted no power to the District Court to try these issues *de novo*.⁶

Second. The Circuit Court of Appeals, in affirming the District Court's judgment, did not rely upon that court's resolution of the issues of fact raised before the deputy commissioner. It based its decision on a matter of law. In the light of the uncontradicted fact that the insurance carrier had tendered compensation and had kept its tender good down to within less than a year before the filing of respondent's claim, the majority of the court

⁶ *Crowell v. Benson*, 285 U. S. 22, 46, 66-72; *So. Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 257. The cases in the lower courts are collected in 33 U. S. C. A. § 921, Note 3, pp. 216-218.

concluded that a tender of compensation was the equivalent of payment of compensation without an award within the intent and meaning of § 13(a) of the statute.⁷ It found support for its view in the provisions of § 14 of the Act,⁸ which require an employer or insurer who denies liability to file with the deputy commissioner a notice of controversy so as to bring on the question of liability for decision.

We think this construction of the Act inadmissible. Tender is not payment. The insurer at no time denied liability but continuously admitted it and expressed its desire to pay compensation. Laying aside, as the Circuit Court of Appeals properly did, questions of waiver and estoppel, there was nothing to prevent the respondent's filing his claim as the Act contemplates⁹ if the insurer neglected to pay compensation. If he refused to accept payment and refrained from filing a claim, whether because he believed he had a cause of action against a third party or against his employer, or for any other reason, he was none the less bound to present his claim within the time fixed by the statute. The fact that the insurer was willing to pay compensation, which he refused, does not bring him within the exception stated in § 13(a).

Third. At the argument at our bar it was suggested that the judgment below might be sustained on another ground, namely, that the furnishing of medical care to the respondent up to a time well within a year of the presentation of his claim was payment of compensation within the meaning of § 13(a). On this theory it was urged that the one year period within which a claim must be filed would run from the date of the last rendition of medical care.

At the insistence of respondent's counsel, the deputy commissioner took an opposite view. While he denied compensation in the form of money payments to the respondent, he ordered the continuance of medical care. This was upon the theory that the Act treats the employer's obligations to pay compensation and to render medical aid as independent.

Although the point is raised for the first time in this court, if we find it meritorious we may consider it as supporting the judgment below.¹⁰ We hold, however, that the furnishing of medical

⁷ *Supra*, Note 3.

⁸ 33 U. S. C. § 914.

⁹ 33 U. S. C. 914(h), 919(a) (c).

¹⁰ *Langnes v. Green*, 282 U. S. 531, 536, and authorities cited.

aid is not the "payment of compensation" mentioned in § 13(a). Section 2 of the Act¹¹ is devoted to definitions, one of which is: "(12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein."

Section 6 provides "(a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in § 7 of this chapter." The benefits covered in § 7 are the medical services which the employer is bound to furnish, but that section significantly provides that, if the employee refuses to submit to medical treatment, the deputy commissioner may, by order, "suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal." Here compensation is contrasted with medical aid.

Section 8 is entitled "Compensation for disability". The section deals solely with money compensation.

Section 10 states that "except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation"

Section 14 deals throughout with what it terms "compensation". All of its provisions have to do with the periodic money payments to be made to the injured employee and make no reference to medical care.

Section 4 of the Act, it is true, refers "to the compensation payable under §§ 7-8-9". It may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term "compensation". In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. Only if the employer and the insurer omit to furnish such care can the employee procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.

¹¹ The sections referred to in the following discussion are found in 33 U. S. C. under the same section numbers as are used in the original Act, except that each is prefixed with the figure "9"; e. g. section 2 appears in the code as section 902. In the interest of brevity we shall refer to them as they appear in the Act as it is printed at 44 Stat. 1424.

In the light of all the provisions of the Act, we are persuaded that the terms "payment" and "compensation" used in § 13(a) refer to the periodic money payments to be made to the employee.

The judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

So ordered.

Mr. Justice BLACK dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice MURPHY concur.

It has been said that the Act under consideration "should be construed liberally in furtherance of the purpose for which . . . enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co. et al. v. Norton, Deputy Commissioner et al.*, 284 U. S. 408, 414. The construction given the Act by the court below, which I think was correct, avoids such a result. The result of the construction here is to deprive an injured person of the compensation which the law intended he should have and which the insurance company, defendant, has admitted it owes. The only defense is a one-year statute of limitations, and that defense was not set up under circumstances that square with the Act's purposes. What are those circumstances?

These facts are undisputed: November 12, 1935, Pletz was injured while working for a steamship company which carried liability insurance with the *Farmer's Fund Insurance Co.*, one of the ~~appellants~~ here. November 26, 1935, the insurance company's attorneys reported to the deputy commissioner administering the Act that payments to Pletz had begun and would continue until notice was given the commissioner. The insurance company did tender a check to Pletz while he was in the hospital which he declined because he thought it insufficient, and on December 4, 1935, the insurance company advised the Commissioner of the refusal. Negotiations between Pletz and the insurance company continued through repeated conversations for a year and five months. The Company lawyer testified that "I made the definite offer to him very early in the case that I would pay him his compensation any time he wanted to take it . . . and I told him that I made that offer and that he could take it any time he wanted to. . . ." It

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is apparent that the controversy throughout was not over the existence of a just claim, but over its size.

November 5, 1936, while negotiations were still in progress, and only seven days before the expiration of the year, the Commissioner wrote the attorney asking about the status of the claim. The attorney responded six days before the statute is said to have operated. He gave no information that Pletz had never accepted compensation, and reported only that he had put Pletz under a doctor's care and that no report had been received from the doctor. If the Commissioner had thought that the claim was controverted, he would have been obligated under sec. 14(h) of the Act to hold hearings and take action "upon his own initiative" to protect the rights of the parties. Under that section such a course is required where payment has been stopped or suspended. Instead, the insurance company attorney, according to his own testimony, continued to negotiate with Pletz until his claim was finally filed on April 19, 1936. The claim itself was filled out in the company lawyer's office without a hint of limitations. Then, for the first time, the company "filed its controversial" with the Commissioner and pleaded in it the statute of limitations.

The Commissioner found in substance that there had been no over-reaching of Pletz by the Company and that therefore the Company was not estopped from setting up the statute. Accepting his finding of facts I think that the Commissioner's conclusion was based on an erroneous conclusion of the law concerning estoppel and limitations, and that the continuous process of negotiation and communication between the Company, Pletz, and the Commissioner, bar the defense made here.

In *Schroeder v. Young*, 161 U. S. 334, 344, this Court said:

"Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

Here, the insurance company's representative has sworn, and his evidence is undisputed, that he promised to pay Pletz "his

compensation any time he wanted to take it", a statement which was never withdrawn, and which in connection with the continued negotiations for a lump sum settlement, even after the statutory period had expired, was more than an equivalent of an express promise not to plead the statute of limitations. It is perhaps an understatement to say that the company attorney's conduct was a tacit encouragement to Pletz to act on the assumption that the Company would never dispute its constantly admitted liability. *Swain v. Scamens*, 9 Wall. 254, 274. The statement of the Supreme Court of Illinois is in harmony with the general rule of law throughout the country: "Where an insurance company leads a party to delay the bringing of suit, or to dismiss a suit already pending, by holding out hopes of adjustment, or by making promises to pay, it is estopped from taking advantage of such delay or dismissal, by pleading the statute of limitations." *Conductors' Benefit Association v. Loomis*, 142 Ill. 560; 572; cf. *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161; 178; *O'Hara v. Murphy*, 196 Ill. 599. See also *Howard v. West Jersey, etc. Railroad Co.*, 102 N. J. Eq. 517, 522; *Baker-Matthews Manufacturing Co. v. Grayling Lbr. Co.*, 134 Ark. 351, 354, 355; *McLearn v. Hill*, 276 Mass. 519. These cases illustrate the principle announced by this Court "that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Insurance Company v. Wilkinson*, 13 Wall. 222, 233.